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# The Virtuous Lawyer: Paradigm and Possibility

Robert Araujo

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# Articles

## THE VIRTUOUS LAWYER: PARADIGM AND POSSIBILITY

*Robert Araujo, S.J.\**

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"Happy are we if we exercise justice and constantly practise  
[sic] virtue!"<sup>1</sup>

"The Happiness of society is the end of government . . . All  
sober inquirers after truth . . . have declared that the happiness of  
man, as well as his dignity, consists in virtue."<sup>2</sup>

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1. *Psalms* 106:3 (Jerusalem).

2. John Adams, *Thoughts on Government*, in 4 THE WORKS OF JOHN ADAMS 193 (1776). In a contemporary context, the relevance and importance of truth to today's lawyer is no less important than in the time of John Adams and the Founders of the American republic. See Thomas L. Shaffer, *On Lying for Clients*, 71 NOTRE DAME L. REV. 195 (1996).

## I. INTRODUCTION

IN the recent past, much ink has been consumed to discuss the decline of professionalism and ethical behavior within the legal profession.<sup>3</sup> The pages of scholarly legal periodicals as well as national and state bar journals have presented the concerns of many who are alarmed about the negative direction in which many members of the legal profession appear to be taking themselves and many of their colleagues.<sup>4</sup> While critics of lawyers have argued well the case against them, the critics could not have convinced their readers of the sorry state of legal professionalism if the decline were not true. After all, one need only consider the status of the profession in the minds of many Americans in the aftermath of a

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3. Prior to this Article, I have addressed some of the issues about the relationship between virtue, the role of judges, and the law. See Robert J. Araujo, S.J., *Thomas Aquinas: Prudence, Justice, and the Law*, 40 LOY. L. REV. 897 (1995); Robert J. Araujo, S.J., *Moral Issues and the Virtuous Judge: Reflections on the Nomination and Confirmation of Supreme Court Justices—From O'Connor to Thomas*, 35 CATH. LAW. 311 (1994). See generally MARY A. GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); see also Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543 (1994); Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513 (1994); Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992); John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563 (1994); Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949 (1995); Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271 (1994); Brent E. Dickson & Julia B. Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531 (1994); James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735 (1992); Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199 (1994); Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31 (1993); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 (1994); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85 (1994).

4. See Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 343 (1995) (presenting a comprehensive view of scholarly as well as professional literature on the subject of professionalism as well as a critique of the "professionalism crusade" which "assumes that there is one true way to be a good person and a conscientious lawyer"); Heidi L. Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 887 (1996) (contrasting the "technocratic lawyer" who is a "legal minimalist" with the "honorable attorney" who, while working diligently on behalf of her client, encourages the client to consider "a host of factors other than the client's own narrow self-interest when defining goals and choosing means to attain them"). See also Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9 (1995), for an examination of the issues faced by the legal practitioner in being both a "good lawyer" and a "good person"; Mark N. Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113 (1995), where the author investigates the attractions as well as limitations of "civility codes" for practicing lawyers. Professor Aaronson maintains that, by relying on classical ideas of civility, lawyers can cultivate the "strength of character needed to exercise self-discipline when making practical or ethical choices." *Id.* at 116. In this context, see Robert J. Araujo, *Humanitarian Jurisprudence: The Quest for Civility*, 40 ST. LOUIS U. L.J. 715 (1996).

particular double-murder trial which took place in Los Angeles last year.<sup>5</sup>

Without referring to any specific attorney, I would briefly like to consider one type of lawyer whom I shall call the "victorious lawyer." The victorious lawyer is a model which stands as a counterpoint to the "virtuous lawyer" who is the subject of this Article. Now, the victorious lawyer is not a corrupt individual who schemes and plots to violate laws and contemptuously flaunt ethical standards of conduct. He is, however, the lawyer who has only one goal: to win regardless of the cost and regardless of the compromises made with norms which lawyers and lay people alike regard as the requirements of participating in civil and courteous society. The victorious lawyer plays hardball as that term has been defined by various members of the profession within the last decade.<sup>6</sup> This lawyer takes pride in his arsenal of victory-oriented tactics which, while not strictly forbidden by the law, nonetheless keep him ever so close to the narrow line between proper and improper professional conduct. For example, the victorious lawyer knows how to wear the opposing lawyer and party down with lawful but unnecessary discovery requests. The victorious lawyer knows that the crushing financial burdens facing the opponent who is to comply with such discovery requests may prompt it to concede its case or to accept a compromise which would otherwise be deemed unreasonable in order to conclude litigation of an otherwise just case which it can no longer afford. Another tactic found in this storehouse is to file court documents at times known to be the most inconvenient or unreasonable for the other side. The victorious lawyer is scrupulous about not breaking the law. However, his *modus operandi* carries the hallmark of aggressively seeking all advantages and making no concessions—an identification which over time alienates the victorious lawyer from the bench, the bar, and opposing parties. In characterizing such a lawyer, the term "honorable" would not come to mind.

Yet, it is important to remember that there are many lawyers—perhaps a majority—who are the solid citizens of the profession who day after day offer sound counsel to and provide ethical advocacy on behalf of their clients—clients who may be amongst the poorest of the poor in court-appointed cases or the large, solvent clients who are the envy of corporate America or someone or some institution in between these two extremes. I would suggest at this point in my Article, that these lawyers

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5. See, e.g., Steven Keeva, *Storm Warnings*, 81 A.B.A. J. 77 (1995); Colman McCarthy, *Justice by the Dollar*, WASH. POST, Aug. 13, 1994, at A17.

6. See, e.g., Catherine T. Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945 (1991); Barlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 FED. RULES DECISIONS 283 (1996); E. Norman Veasey, *Rambo Be Gone! Delaware's Chief Justice Comes Down Hard on the Miscreants of the Legal Profession*, BUS. L. TODAY, Jan.-Feb. 1995, at 12; Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990); Bradley W. Foster, Comment, *Playing Hardball in Federal Court: Judicial Attempts to Referee Unsportsmanlike Conduct*, 55 J. AIR L. & COM. 223 (1989); Andrew R. Herron, Comment, *Collegiality, Justice, and the Public Image: Why One Lawyer's Pleasure Is Another's Poison*, 44 U. MIAMI L. REV. 807 (1990).

probably exercise virtuous qualities in their personal and professional lives.<sup>7</sup> In my twelve years of practicing law,<sup>8</sup> I encountered many such individuals who were and remain virtuous people and virtuous professionals.

My suggestion may present an alternative image to the popularly held notion of lawyers as self-seeking hucksters who will make any argument to win a case for any client. The alternative I shall identify and discuss is the virtuous lawyer. When I first began to discuss this topic with teaching colleagues of mine—some lawyers, others not—I received the same general response which usually began with laughter and followed with a statement that went something like, “But aren’t those contradictions of terms?”

It is my goal to show that the contradiction is not a universal but a particular—a particular which can be remedied as more members of the profession appropriate the essential qualities and habits of the virtuous lawyer in their own lives. Moreover, my further purpose in writing this Article is to demonstrate that there is such a person as the virtuous lawyer who sees the correlation between the law, the legal system it produces, and the fashion in which members of society live in right relationship with one another. I propose to study the link between the statement quoted from the third verse of Psalm 106 at the beginning of this Article and an approach to understanding both the desirability and role of the virtuous lawyer today. Therefore, from time to time I turn to the Hebrew and Christian scriptures which present another model of the virtuous individual (lawyer) and the legal system.<sup>9</sup> The story of these pilgrims struggling with their quest for virtue and searching for God’s justice in this world provides useful material for understanding what human legal institutions and their search for justice is or should be about. In short, there are lawyers who see themselves living with justice in their professional as well as personal lives because they also practice virtue.<sup>10</sup>

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7. See generally VIRTUE: NOMOS XXXIV (John W. Chapman & William A. Galston eds., 1992). Professor Galston comments on the revival of scholarly interest in virtue and the impact of this contemporary investigation on legal and political institutions. As he states, “However virtue is to be theoretically understood, it leads irresistibly to a practical concern with the social, legal, and political structures that help shape individuals.” *Id.* at 2.

8. I was engaged in the active practice of law from 1974 to 1986 whereupon I entered the Society of Jesus (the Jesuits), a Roman Catholic religious order.

9. For example, after the exile from Egypt, Israel was instructed by Moses on God’s law for the people. One example of this is a portion of *Exodus* which exhorts the people to never spread false reports, serve as a malicious witness, side with the majority in a lawsuit if that would pervert justice, be unnecessarily partial to any party to a lawsuit, or pervert the justice due the downtrodden. See *Exodus* 23:1-6 (NRSV).

10. A wonderful and helpful introduction to the relationship between virtue and the legal profession is Professor Thomas L. Shaffer’s *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393 (1990-1991). Later in this Article, I investigate the distinction between principles and virtues. For Shaffer, “Virtue words, as distinguished from principle words, speak about moral qualities.” *Id.* at 396 (emphasis in original). Shaffer identifies with Aristotle’s method of teaching morals by “describing the virtues . . . noticed in admirable people.” *Id.* The essence of virtues is that they are “good habits.” *Id.*

Before I begin to develop my thesis and offer justification for its tenets, I take the reader on a digression and an excursion along a path less traveled: the world of Hollywood—a place not too distant from the city of Los Angeles mentioned earlier. The excursion spins off of a creation of Hollywood, namely from the film *The Wizard of Oz*.<sup>11</sup> It is within this film, a film which in large part portrays reality in addition to fantasy, that a person not initiated to the world of virtues is introduced to subjects vital to this Article. It is through the well-known characters of this fable that we see another familiar group of pilgrims who are seeking particular virtues in order to achieve the just results to which they and others are entitled.

## II. A DIGRESSION AND AN EXCURSION DOWN THE YELLOW BRICK ROAD

In the opening moments of the film *The Wizard of Oz*, we see young Dorothy—and Toto, too—being carried by a cyclone from the farm lands of Kansas to the far off Munchkindland. After crash-landing with her house and conveniently dispatching the Wicked Witch of the East, the nemesis of the local Munchkinders, Dorothy—and, yes, Toto, too—seek their way back to Kansas. The Munchkinders, while being very kind, are unable to help Dorothy and her faithful canine return home. But they know that the great wizard who lives in the Emerald City should be able to help her if anyone can. When she inquires how she can get to the Emerald City, the locals tell her to follow the yellow brick road, and that she does. While en route to the Emerald City, she encounters three other entities who, like herself—and, yes, once again, Toto, too—also are in search of something. It is at this stage of the film that we viewers begin to see the relevance of the film to my theme about the virtuous lawyer.

After leaving Munchkindland, Dorothy passes by a field and encounters a scarecrow—mind you, not just any scarecrow, but *the* Scarecrow. As she passes by this poorly attired fellow, he calls out to Dorothy and seeks her assistance to be released from his restraining perch. After she complies and they talk for a bit, Dorothy relates her plan that in order to get home she must seek the assistance of the Great Wizard. The Scarecrow takes a fancy to that and proclaims that perhaps he too can seek that which he has always wanted—a brain. Apparently, scarecrows do not come with brains as standard equipment—straw, yes; cast-off clothes, yes; but, alas, no brain.

As the story develops, this ensemble of Dorothy and the Scarecrow—and, dare I say yet again, Toto, too—make way to the Emerald City and their audience with the Great Wizard. As their journey evolves, they encounter a badly rusted tin woodsman—mind you, not just any tin woodsman, but *the* Tin Woodsman. Once cleaned up and nicely lubricated, he proclaims that he needs a heart since his builders seemed to have left that

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11. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

out of his design. It makes capital sense that he join the other seekers and present his petition for a heart to the Great Wizard of Oz. As the sojourners make way to the Emerald City, their progress is momentarily delayed by the appearance of a lion—mind you, not just any lion, but *the* Cowardly Lion. He too seems to be deficient in that which makes a lion a lion. He is cowardly, and lions ought not to be cowardly; they are supposed to be strong, commanding, and courageous. He agrees to join our band of Ozian pilgrims so that he might petition the Great Wizard for the courage he apparently lacks.

Ultimately, the story brings these adventurers to their destination and their destinies. Each of these pilgrims sought something they thought they lacked or lost: Dorothy wanted to go home, and indeed she does—along with, you guessed it, Toto, too. But Dorothy also discovers something else, namely the gift of prudence—a virtue which provides both the means and endurance for achieving whatever else needs to be achieved. The Scarecrow, who thought he needed a brain, discovers that he possessed all along the virtue of wisdom—the virtue which provides the insight and sagacity to know what should be done next. Our Tin Woodsman, who thought he was cardio-deficient, discovers that he possessed compassion from the outset—the virtue of caring and concern for others. Of course, there is the Cowardly Lion who, when all is said and done, always possessed courage—the virtue which provides the necessary personal reinforcement needed when a person—or a lion—seems to be standing all alone. I ought to mention the Great Wizard of Oz at this stage, for he too displays another important virtue, the virtue of justice—for he helps these pilgrims recognize and realize the goals which they had sought.

The excursion down the Yellow Brick Road must end here. But the journey of this Article continues by examining in greater detail these virtues and what they mean or can mean to the members of the legal profession.

### III. THE VIRTUES AND THEIR RELATIONSHIP TO LAW AND LAWYERS

Since the Watergate episode some twenty years ago, the relevance of ethics to the legal profession has received more attention. Some of the language and the concepts relied upon in the context of discussion about ethical and moral lawyers is associated with human virtues. Sometimes we hear that a lawyer must possess the courage and fortitude needed to see that justice is done. Think of Atticus Finch in the film *To Kill A Mockingbird*.<sup>12</sup> Among other qualities, Finch possessed the attribute of compassion which tempers with mercy the judgment of the wrongdoer, yet extends compassion and sorrow to the suffering of the victim for the

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12. *TO KILL A MOCKINGBIRD* (Universal Pictures 1962).

overriding goal of equity, of justice under law.<sup>13</sup>

The reader may ask the question if this is all that need be known about virtue? No, there is considerably more as I shall demonstrate. I simply suggest here that the virtue criteria used to evaluate a lawyer and what the lawyer does are, when taken as a coherent package, vital to the consideration of professional responsibility.<sup>14</sup> In presenting and arguing my position, I will first introduce the reader to what virtues are, and, second, I shall illustrate how they form a set of criteria distinct from other criteria traditionally used in evaluating professional conduct of lawyers.

I begin this part of the discussion with Alasdair MacIntyre's preliminary definition of virtue as "an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving such goods."<sup>15</sup> Putting this remark in the context of the quotation from Psalm 106 at the beginning of this Article, we see another voice suggesting the inextricable link between justice (the goal of the legal profession) and virtue. An important foundation for MacIntyre is Thomas Aquinas who understood virtue to be "a good quality of the mind" by

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13. In William Shakespeare's *The Merchant of Venice*, Portia, portraying a doctor of the law, exhorts Shylock to reconsider his demand for Antonio's pound of flesh:

The quality of mercy is not strain'd,  
It droppeth as the gentle rain from heaven  
Upon the place beneath. It is twice blest:  
It blesseth him that gives and him that takes.  
'Tis mightiest in the mightiest, it becomes  
The throned monarch better than his crown,  
His sceptre shows the force of temporal power,  
The attribute to awe and majesty,  
Wherein doth sit the dread and fear of kings;  
But mercy is above this scepter'd sway,  
It is enthroned in the heart of kings,  
It is an attribute to God himself;  
And earthly power doth then show likest God's  
When mercy seasons justice. Therefore, Jew,  
Though justice be thy plea consider this,  
That in the course of justice, none of us  
Should see salvation. We do pray for mercy,  
And that same prayer doth teach us all to render  
The deeds of mercy.

WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1, ll. 184-202 (G. Blake-more Evans ed., Riverside Shakespeare 1974).

14. For an illuminating and applicable discussion of general responsibility in a Christian context that has bearing on my Article, see WILLIAM SCHWEIKER, *RESPONSIBILITY AND CHRISTIAN ETHICS* 65-69, 161-63 (Cambridge Univ. Press 1995) (examining the contribution of Aristotle and Aquinas to personal responsibility through their investigation of virtues and virtuous conduct).

15. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 191 (Notre Dame, 1984) (emphasis omitted). MacIntyre defines "practice" as follows:

[A]ny coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.

*Id.* at 187.



which people live righteously.<sup>16</sup> If the function of ethical systems is to guide people—including lawyers—in their moral deliberation toward right action,<sup>17</sup> a legal profession which treasures virtue in its work will direct lawyers to become better moral agents.<sup>18</sup> The course which the moral agent (lawyer) takes is directed toward a goal, a *telos*.<sup>19</sup> Because individual humans are also social beings whose existence is grounded in relationships with others, the concept of the *telos* can assist the lawyer to understand and answer better the ethical and moral questions which members of the legal profession face as they promote the reconciliation of differences within society.<sup>20</sup>

Joseph Kotva has argued that the *telos* of virtue-based method is inextricably intertwined with the means to achieve the goal because this approach provides the means to move society toward a better understanding of the end, an end which forms a specific kind of person and promotes a kind of society that stipulates behavior directed toward a just society.<sup>21</sup> Kotva points out that for some individuals, the kind of person each of us identifies the kind of moral questions we address.<sup>22</sup> His observation and conclusion suggest that the practice of virtue acknowledges the sense of "otherness"; that is, in making moral decisions about who we are, what our goal is, and what means we use to get there, we necessarily think of other individuals as we work toward the goal. The practice of virtue relies on a sense of community, on an awareness of relationships with others. I suggest here that the notion of living in right relation with others parallels the cultivation of the virtue of justice in one's life. Since much of contemporary American jurisprudence focuses on the individual and the autonomous person's rights and liberties, a reliance on virtues and virtue-based ethical systems may help lawyers understand that (1) the individual is simply not only an autonomous being but is also a member of a community and (2) both the individual and the community are significantly affected by the law and those who administer it. Acknowledgment of this point is important in the exercise of a law-

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16. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, I-II, Q. 55, art. 4 (Benziger Brothers, Inc. ed. & Fathers of the English Dominican Province trans., 1947).

17. James F. Keenan, S.J., *Virtue Ethics: Making a Case as It Comes of Age*, 67 *THOUGHT* 115 (1992).

18. *Id.* at 116.

19. MACINTYRE, *supra* note 15, at 203 ("[T]here is a *telos* which transcends the limited goods of practices by constituting the good of a whole human life, the good of a human life conceived as a unity. . . ."). Accord Keenan, *supra* note 17, at 120, 123; Joseph J. Kotva, *An Appeal for a Christian Virtue Ethic*, 67 *THOUGHT* 158, 159 (1992). As James Keenan stresses, "Only in virtue ethics is a *telos* constitutive of method; no other ethical system can make that claim." Keenan, *supra* note 17, at 123.

20. I have developed the idea of a *telos* underlying the social institution of law elsewhere. See Robert J. Araujo, S.J., *The Teleology of the Law: Responsible Citizenship and Discipleship*, 35 *CATH. LAW.* 57 (1992).

21. Kotva, *supra* note 19, at 159. As this author further suggests, "the means cannot be separated from the end because the means are central to the end. A *telos* which embodies the virtues of justice, courage, and fidelity cannot be severed from acts and social arrangements that are just, courageous, and faithful." *Id.* at 160.

22. *Id.* at 166.

yer's duties. Lawyers are, after all, often asked to help resolve conflict between people; they are called upon by litigants to render justice by participating in the resolution of the disagreement. Lawyers are concerned about individuals who live in community, not individuals who live in isolation from one another. While individuals have rights which should be protected, this is not the only matter with which lawyers are or can be concerned. The relationship between the individual and the community is a subject that has been at the heart of the study of virtues, the virtuous person, and justice for some time.<sup>23</sup>

Plato was an early commentator who investigated the relationship between virtue and justice. For him, justice was the fundamental component of society, the "necessary conduct in everything from beginning to end."<sup>24</sup> Above all else, justice—as a virtue—was the guarantor of other important virtues like temperance, courage, and wisdom which will be momentarily addressed.<sup>25</sup> These virtues are important because they aid in directing human conduct, which helps achieve the goal of a society in which its members live in right relationship with one another. Aristotle saw justice as the "complete virtue" in the context of a person being in right relation with his neighbor.<sup>26</sup> In refining his understanding of justice as the greatest of virtues in which a person seeks to be in right relationship with others, Aristotle concluded that people who are true friends (*i.e.*, they wish well to one another<sup>27</sup>) have no need for any other kind of justice because their friendship is the truest form of justice.<sup>28</sup> Thomas Aquinas saw virtue as the good quality of the mind which facilitates people living righteously; he also acknowledged that the virtue of justice is a good habit in which each person perpetually renders to the other person that which is due (*i.e.*, the *suum cuique*).<sup>29</sup> Mary Ann Glendon has reaffirmed Aristotle's position in her argument that the tendency to make rights and privacy absolute in the American legal culture has minimized

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23. See SCOTT D. GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 36 (1995) (examining Samuel Adams's belief that virtue, while not an end in itself, was an important means to secure the natural rights of individuals). As Gerber explains, "The cultivation of virtue was but a way of accomplishing that objective [protection of natural rights], for virtue instilled in the people the necessity of restraining their selfish impulses—impulses that would otherwise render natural rights insecure." *Id.*

24. PLATO, *REPUBLIC* bk. IV, at 432d (G.M.A. Grube trans., 1992).

25. *Id.*

26. ARISTOTLE, *THE NICOMACHEAN ETHICS* bk. V, ch. 1, at 1129b (David Ross trans., Oxford Univ. Press 1980).

27. *Id.* bk. VIII, ch. 3, at 1156b.

28. *Id.* bk. VII, ch. 14, at 1155a. For a helpful discussion of diverse views concerning the role of friendship in practical legal counseling, see John M.A. DiPippa, *Jacob's Blessing: A Review of Shaffer's and Cochran's Model of Moral Counseling*, 18 U. ARK. LITTLE ROCK L.J. 85 (1995); Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L.J. 1 (1995); Thomas L. Shaffer & Robert F. Cochran, *Lawyers as Strangers and Friends: A Reply to Professor Sammons*, 18 U. ARK. LITTLE ROCK L.J. 69 (1995).

29. AQUINAS, *supra* note 16, at II-II, Q. 58, art. 1.

the significance of fraternity.<sup>30</sup> Glendon argues that unrestricted individualism can foster a climate that is inhospitable to "society's losers" (those who are especially dependent on others), and because it neglects civil society, it undermines both civic and personal virtue. As she further argues, individualism "shuts out potentially important aids to the process of self-correcting learning [and promotes] mere assertion over reason-giving."<sup>31</sup>

The virtue of justice, like the legal system itself, is practiced or engaged in by human beings in a community setting. It is not understood as something which is good or proper simply for the individual alone; rather, it manifests itself in good relationships or true friendship where each person renders the other his or her due.<sup>32</sup> Justice as a virtue manifests itself in the midst of people who are in relationship with one another; it does not exist in the vacuum of persons who are isolated from one another. Essentially, the virtue of justice depends on community; its prerequisite is two or more people who acknowledge one another's existence and where each honors the other person's right to co-exist (because each expects his or her own right to exist to be honored by the other). An important goal of the virtue of justice is to achieve multiple levels of reciprocity throughout society in which every person renders to one another those concerns which each has for the self. The virtuous person, who becomes the virtuous lawyer and who will have the duty to render justice, can see this readily.

Much of the kind of justice which has emerged in the present-day American legal culture has lost a good deal of its community-oriented goal. Many contemporary understandings about "justice" lead to a narrow focus on individual, but not community, concerns because of the strong desire to protect individual rights and privacy above all else. This necessitates, for John Finnis, an understanding of justice as the realization of basic human goods for one's self *as well as* for others.<sup>33</sup> In a similar fashion, Mary Ann Glendon points out that the social, the communal, and the *teleological* components of duties which are the correlatives of rights are infrequently discussed in this contemporary environment.<sup>34</sup> She correctly argues that these components are essential to dealing justly

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30. MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 47-48 (1991). Christopher Mooney has similarly commented on this theme in the context of the law and legal profession. He argues that the law's "privatizing impulse has tended to become dominant and it no longer conceives its primary mission to be the responsible exercise of public virtue." CHRISTOPHER MOONEY, S.J., *PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION* xi (1986).

31. GLENDON, *supra* note 30, at 14.

32. At *Exodus* 19:15, the Hebrew people were notified about the importance of giving the other that which is due: "You shall not render an unjust judgment; you shall not be partial to the poor or defer to the great: with justice you shall judge your neighbor." In a similar vein, the Prophet Zechariah warned: "Thus says the Lord of hosts: Render true judgments, show kindness and mercy to one another; do not oppress the widow, the orphan, the alien, or the poor; and do not devise evil in your hearts against one another." *Zechariah* 7:9-10.

33. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 161 (1980).

34. GLENDON, *supra* note 30, at x-xiii, 14, 45, 47-48, 171-72.

with some of the urgent legal issues which have, in the American context, been cloaked with near-absolute rights of privacy, individual autonomy, and isolation.<sup>35</sup> To balance the excessive and narrow focus on the rights which emerge from the principle of autonomy, Glendon acknowledges the importance of understanding the needs of *all* the parties involved in order to reach the just end concerning the rights and responsibilities associated with many of the disagreements between members of society which lawyers are asked to referee.

If we try to determine what is the just goal for both society as a whole and its individual members, a virtuous solution to interpersonal conflict begins to emerge. In response to legal controversies that work their way into courts, justice-as-virtue avoids the problems associated with the "winner-take-all" attitude that characterizes much of the process of litigation over which today's lawyers supervise and direct. But, as a practical matter, how do we move toward the goal of justice as virtuous people? This is where the virtue of prudence comes into play.

If the virtue of justice prescribes the just goal or end, then prudence and compassion are the means to that end.<sup>36</sup> Permeating prudence is the

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35. MARY A. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 38 (1987). While proceeding from a different school of thought, Joseph Raz has offered a parallel thought. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 250 (1986). Raz addressed the subject of personal autonomy and suggested that while "an individual's freedom, understood as personal autonomy, sometimes conflicts with the interests of others, it also depends on those interests and can be obtained only through collective goods which do not benefit anyone unless they benefit everyone." *Id.* Elsewhere, he acknowledges that the morally good person recognizes that the individual's interests are so inextricably related with those of other members of society "that it is impossible to separate his personal well-being from his moral concerns." *Id.* Raz makes it clear from the outset of *The Morality of Freedom* that his argument supports "a liberal morality on non-individualistic grounds." *Id.* at 18. His search is for a "morality which regards personal autonomy as an essential ingredient of the good life, and regards the principle of autonomy, which imposes duties on people to secure for all the conditions of autonomy . . ." *Id.* at 415. Raz does not offer an elaborate definition of the good life. He explains the good life as "a life which is a free creation" in which there will be "a multiplicity of valuable options to choose from. . ." *Id.* at 412.

36. Kotva, *supra* note 19, at 166 (acknowledging his debt to James Keenan, S.J. for this insight); see also Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 *YALE L.J.* 1567 (1985) (examining, through the vehicle of Alexander Bickel's political philosophy, the value of prudence as both a political and legal virtue). Kronman further explains prudence:

By prudence I mean a trait or characteristic that is at once an intellectual capacity and a temperamental disposition. A prudent judgment or political program is, above all, one that takes into account the complexity of its human and institutional setting, and a prudent person, in this sense, is one who sees complexities, who has an eye for what Bickel called the "unruliness of the human condition" . . . . A prudent person is also one with a distinctive character—a person who feels a certain "wonder" in the presence of complex, historically evolved institutions and a modesty in undertaking their reform; who has a high tolerance for accommodation and delay and is able to accept the final incommensurability between any system of ideas and the world as it is given to us with all its raggedness and inconsistency; who values consent but is not demoralized by the process of irrational compromise that is often needed to achieve it. In the prudent person these qualities of intellect and character are joined.

*Id.* at 1569 (footnotes omitted).

virtue of compassion which tempers the just end.<sup>37</sup> The virtues of prudence and compassion work in tandem to promote improvements in social structures that will simultaneously display greater charity toward both individuals and society at large—toward the perpetrator as well as the victim.<sup>38</sup> Those lawyers who recognize this have followed Aquinas who saw the connection between the virtue of prudence which directs people so that they relate their own good to the good of others (*i.e.*, the common good).<sup>39</sup> Moreover, Plato's understanding of temperance contributes to an appreciation of the importance of prudence because prudence is the virtue which brings harmony into society by promoting "concord" among all the elements of the community.<sup>40</sup> Aristotle's understanding of this virtue concentrated on a state of character:

We may thus conclude that virtue or excellence is a characteristic involving choice, and that it consists in observing the mean relative to us, a mean which is defined by a rational principle, such as a man of practical wisdom would use to determine it. It is the mean between two vices: the one of excess and the other of deficiency.<sup>41</sup>

My concern about virtue raises considerations which every member of the contemporary American legal profession can reflect upon and adopt. I suspect that even the lawyer with the strongest client orientation would take comfort knowing that the opponent-lawyer practices the virtues of compassion and temperance. Both virtues provide an atmosphere which helps reassure litigants that they will be heard out and that their individual and mutual concerns will be carefully evaluated—just as the opponent's concerns will be. The considerations set the stage for another important virtue: courage.

Courage is the virtue that enables lawyers to meet the challenge of harm or danger when they attempt to take action based on the care and concern they have for individuals and communities.<sup>42</sup> The exercise of this

37. See Benjamin Zipursky, *DeShaney and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1134-37 (1990).

38. When the disciples asked Jesus to teach them how to pray, He reminded them to "forgive us our debts, as we have also forgiven our debtors." *Matthew* 6:12.

39. AQUINAS, *supra* note 16, at IIa-IIae, Q. 50, art. 2. For a helpful discussion of the relationship between virtue and law, see DANIEL WESTBERG, *RIGHT PRACTICAL REASON: ARISTOTLE, ACTION, AND PRUDENCE IN AQUINAS* 229-44 (1994). Westberg cautions against seeing only contradiction between law and virtue and examines the link between them. *Id.* As Westberg argues, "The reading of the moral philosophy of Aquinas in deontological terms is a bad mistake. . . ." *Id.* at 234. In the context of the law profession and the common or public good, Robert Katzman has acknowledged the "inextricable link between the self-interest of lawyers (and their responsibility as members of a profession) and the public." Robert Katzmann, *Themes in Context*, in *THE LAW FIRM AND THE PUBLIC GOOD* 15 (Katzmann ed., 1995). As he states, "the law firm and the public good are inextricably linked and that each can draw strength from the other in ways that nourish both." *Id.*

40. PLATO, *supra* note 24, bk. IV, 431c.

41. ARISTOTLE, *supra* note 26, bk. II, ch. 6, at 1107a.

42. MACINTYRE, *supra* note 15, at 117-18. In the context of the legal profession, Dean Anthony Kronman has described courage as resisting the pressures of "doing what his client wants in every case." See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 145 (1993). As Kronman further states, "A coura-

virtue takes place when lawyers facing risks and threats in controversial cases (e.g., Atticus Finch representing a black man falsely accused of raping a white woman) can rely on the support of individuals who wish for and are prepared to seek the just end for all.<sup>43</sup>

Underlying the virtues of justice (which helps us recognize the goal), prudence (which provides the means for acting justly), and courage (which reinforces lawyers who take the action essential to reaching the *telos*), is the virtue of wisdom. Wisdom provides the insight, the sagacity by which lawyers come to understand their corporate as well as individual goods and the nexus between them.<sup>44</sup> In the realm of lawyers whose duty it is to help reconcile differences, wisdom enlightens the lawyer to the variety and subtlety of issues and facts in each case. Cultivation of this virtue can open the mind as well as the heart to matters which the person not relying on the virtue of wisdom may miss. It parallels prudence and works in tandem with it.<sup>45</sup> In a virtue-oriented approach to many of today's difficult legal issues, wisdom guides lawyers in the quest for understanding who we are as individuals and as members of society and

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geous lawyer is prepared to take risks for what he or she believes is right—to risk anger, contempt, and a lower income for the sake of the law's own good—and nothing can be a substitute for the fortitude this requires." *Id.*

43. KRONMAN, *supra* note 42, at 123. See 2 *Chronicles* 15:5-7, for the prophecy of Azariah reminding Asa and the people not to abandon hope for God would give them courage if only they believed in Him:

In those times it was not safe for anyone to go or come, for great disturbances afflicted all the inhabitants of the lands. They were broken in pieces, nation against nation and city against city, for God troubled them [because of their apostasy] with every sort of distress. But you, take courage! Do not let your hands be weak, for your work shall be rewarded!

In a similar fashion, we are reminded in *Acts* 23:11 that God came to give courage to St. Paul when he was on trial before the religious authorities: "That night the Lord stood near him and said, 'Keep up your courage! For just as you have testified for me in Jerusalem, so you must bear witness also in Rome.'" *Id.*

44. A remarkable example of this virtue is King Solomon, who, when presented with a difficult case (trying to determine which woman claiming the same child was the real mother), was up to the challenge to dispense justice, as we are reminded in 1 *Kings* 3:28, "All Israel heard of the judgment that the king had rendered; and they stood in awe of [Solomon] because they perceived that the wisdom of God was in him, to execute justice." *Id.* It is clear that Israel was reminded of the correlation between wisdom and justice, when Moses, in *Deuteronomy* 4:5-8, told them,

See, just as the Lord my God has charged me, I now teach you statutes and ordinances for you to observe in the land that you are about to enter and occupy. You must observe them diligently, for this will show your wisdom and discernment to the peoples, who, when they hear all these statutes, will say, "Surely this great nation is a wise and discerning people!" For what other nation has a god so near to it as the Lord our God is whenever we call to him? And what other nation has statutes and ordinances as just as this entire law that I am setting before you today?

*Id.*

45. The *Book of Proverbs* is a great source of the correlation between wisdom and prudence. For example, in *Proverbs* 1:2-7, we are reminded the "fear of the Lord" is essential: "For learning about wisdom and instruction, for understanding words of insight, for gaining instruction in wise dealing, righteousness, justice, and equity; to teach shrewdness to the simple, knowledge and prudence to the young—. . . The fear of the Lord is the beginning of knowledge." *Id.* The author of *Proverbs* personifies Wisdom and has her say, "I, wisdom, live with prudence, and I attain knowledge and discretion." *Proverbs* 8:12.

what we want to become. In the American culture that is strongly characterized by "individual autonomy and isolation,"<sup>46</sup> the focus of individual and community attention on who we are can be blurred. Wisdom helps remove the blur that otherwise inhibits the ability to identify not only who we are now but also what we want to be in the future. When wisdom permeates our consciousness, our knowledge of ourselves becomes more secure and more certain. And, when our self-knowledge grows, the vision of who we want to become both as individuals and as members of communities will become all the more clear. And, when our knowledge of whom we want to become is better defined, our "moral idealism [can] be found and maintained."<sup>47</sup>

#### IV. WHY NOT RULES RATHER THAN VIRTUE?

I have outlined the virtues which have application to the role, duty, and responsibility of lawyers. I suggest here that the virtuous lawyer is concerned about acting ethically and morally in one's attempt to bring peaceful resolution of disputes among citizens. But the virtuous lawyer also uses rules—the law—as the foremost means to achieve a good at the heart of the legal system (*i.e.*, the goal of the just result). In today's discussion of legal and political philosophy, a distinction is often made between the right and the good, or, as some prefer, the deontological and the teleological. Another way of thinking about the distinction is the priority of rules or principles over the priority of goals. The distinction has sometimes been seen as the contrast between Kantian and some utilitarian concepts of justice where rules are more important to the first whereas results are more important to the second.

For purposes of this examination, it would be helpful to make some distinctions between a rules or principles-based and virtue-based legal system. Ultimately the virtue-based system will—unlike principles-based ones—consider more comprehensively the spectrum of interests and experiences which must be addressed by the legal profession.<sup>48</sup> The appli-

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46. GLENDON, *supra* note 35, at 38.

47. Keenan, *supra* note 17, at 123.

48. In this context, Dean Kronman offers some valuable insight. See Kronman, *supra* note 36, at 1570, where the author notes that while the late Alexander Bickel believed that "no good society can be unprincipled," neither can it be "principle-ridden." Kronman notes that Bickel discerned that "abstract theories and moral imperatives . . . have a 'tyrannical tendency' . . . [because] it is . . . self-destructive to insist on an uncompromising fidelity to ideals which dismisses, out of principle, any consideration of the practical realities that may stand in the way of their realization." *Id.* Kronman subsequently identifies prudence to be what Bickel termed "'good practical wisdom'—the ability to 'resist the seductive temptations of moral imperatives,' to live with the disharmony between aspiration and historical circumstance, and to search with 'balance and judgment' for those opportunities that permit the marginal and evolutionary reconciliation of our principles and practices." *Id.* (footnotes omitted). For another helpful discussion on the role of prudence and other virtues in the legal profession, see CHARLES FRIED, *RIGHT AND WRONG* 191-94 (1978). I must assert my disagreement with Professor Fried's point that "[w]e should absolve the lawyer of personal moral responsibility for the result he accomplishes because the wrong is wholly institutional." *Id.* at 192. While wrongs may be "wholly institutional," the fact of the matter is that people, including many lawyers, are responsible for the institution, its

cation of virtue enables the lawyer to discern that the distinction between the right and the good, contrary to some views, reveals more about their relation rather than their separation. A simultaneous appreciation by the lawyer of the right and the good fortifies the practitioner's ability to acknowledge the need to rely on virtue in the practice of the profession.

One way of understanding the distinction between the right and the good is by examining those rules or principles which have a bearing on the law and the legal profession. These principles are four in number: (1) autonomy; (2) nonmaleficence; (3) beneficence; and (4) justice. Ultimately, I shall argue that these principles inadequately address the professional and ethical issues which lawyers must face today. They leave a void in the discourse of the ethical considerations vital to the legal profession which a virtue-based system is better equipped to address.

This does not mean that there are no attractive elements of a principles-based ethical theory. Specific attractions will emerge from the following examination. Both principles-based and virtue-based theories generally share a common element: justice. I now turn to my examination of the first ethical principle: autonomy.

The principle of autonomy can theoretically be defined as "self rule." It is based on the Greek roots *autos* (self) and *nomos* (rule).<sup>49</sup> In the context of biomedical ethics which has recently emerged as an important topic of late twentieth century legal disputes involving termination of life support such as *Cruzan v. Director, Missouri Department of Health*<sup>50</sup> and euthanasia such as *Compassion in Dying v. Washington*,<sup>51</sup> as well as several of the most recent abortion decisions,<sup>52</sup> autonomy can be viewed as the principle based on "reflective individual choice" that is sometimes qualified by an authority (e.g., a combination of professional medical advice and legal responsibilities or by "tradition, or social morality").<sup>53</sup> In the cases just cited, authority does not always constrain autonomous decision making.<sup>54</sup> However, the exercise of autonomy can adversely affect

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makeup, and its achievements. Indeed, lawyers can be accountable for the wrongs which are "wholly institutional" because lawyers and other officials create and sustain the policy- and decision-making institutions which have produced not only the racist machinery of the Third Reich but also the institution of American slavery, the doctrine of separate-but-equal, and the justification of committing Japanese-American citizens to concentration camps.

49. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 67 (1989).

50. 497 U.S. 261 (1990).

51. 49 F.3d 586 (9th Cir. 1995), *rev'd en banc*, 79 F.3d 790 (9th Cir.), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996).

52. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In the plurality opinion of the *Casey* decision, the Court stated, "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851. The plurality also argued that *Roe v. Wade* was "not only . . . an exemplar of *Griswold* liberty," but was also "a rule (whether or not mistaken) of personal autonomy and bodily integrity . . ." *Id.* at 857.

53. BEAUCHAMP & CHILDRESS, *supra* note 49, at 71.

54. *Id.* at 72.



the interests of others when one individual, even unconsciously, in the exercise of personal autonomy challenges the interests of another person who may be constrained from exercising his autonomy without challenging the first person.<sup>55</sup> For example, the matter of a woman's exercising her autonomy by electing to have an abortion distinctly challenges the future ability of the child she carries to exercise its autonomy. While lawyers may disagree on which harms are to be most (or least) avoided and whose interests are to be most (or least) protected, we probably agree that harm is to be avoided. This is the principle of nonmaleficence.

In its simplest form, the principle of nonmaleficence means: do no harm.<sup>56</sup> On first examination, the norm of avoiding harm seems rather attractive. Most ethical individuals likely harbor the general notion that no one should harm another. However, an examination of this principle reveals that it, while attractive by itself, raises questions about the contributions it can make to ethical discourse concerning numerous legal controversies when we realize that it inadequately deals with the underlying question: Who is harmed? This point takes on clarity when the historical interests of slave owners was pitted against those of the slave, or when national security interests were pitted against those of the Japanese-Americans who lived on the west coast of the United States during the Second World War. As admirable as the principle of avoiding harm is, it does have limitations—particularly when it is only applied to one interest but not both. What constitutes the avoidance of harm for one (and therefore good for the protection of that individual's interests) may be prejudicial to the other—as Dred Scott and Fred Korematsu discovered. Thus, if each lawyer turns to the positive effort to do good (as opposed to the avoidance of doing harm), we might obtain a better principle, that is, beneficence, to address the difficult legal questions of the day.

Beneficence is the affirmative course of action one takes to do and achieve good: it "requires positive steps to help others."<sup>57</sup> In their analysis involving medical ethics, Beauchamp and Childress have identified two components within beneficence. The first is a positive component which mandates "the provision of benefits (including the prevention and

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55. See RAZ, *supra* note 35, at 415. Raz develops the notion that personal autonomy "is an essential of the good life" because in the exercise of autonomy, individual members of society recognize that its enjoyment also imposes the duty to extend its enjoyment to others. *Id.* What ensures this for Raz is the presence of toleration (which he labels as a "distinctive moral virtue") because it arrests "the desires, inclinations and convictions which are thought by the tolerant person to be in themselves desirable." *Id.* at 401. For an interesting perspective on the role of autonomy in the liberal state, see Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385 (1996). Gardbaum presents the view that autonomy is not simply a private matter in the state, but a very public one which has a substantive, rather than simply a formal role of allowing the individual to make choices. *Id.* Gardbaum recognizes, as does Raz, that autonomy is not the only principle of value in the modern liberal state, because he acknowledges that its unrestrained exercise can lead one person or group to deny that of another person or group. *Id.* at 417. As Gardbaum maintains, "the genuine pursuit of autonomy and of more equal autonomy cannot in practice be separated." *Id.*

56. BEAUCHAMP & CHILDRESS, *supra* note 49, at 120, 194.

57. *Id.* at 121, 194.

removal of harm as well as the promotion of welfare).<sup>58</sup> The second element is a utilitarian component which "requires a balancing of benefits and harms."<sup>59</sup> While nonmaleficence requires that a person refrain from doing something (*i.e.*, harm), beneficence imposes an affirmative obligation to take some action that will achieve a desirable, good result.<sup>60</sup> The principle of beneficence imposes an obligation for a person to undertake an action that will bring about some good, even where there is no legal obligation to do so.<sup>61</sup> As the attraction to this principle grows, the lawyer tempted to rely too much on it must be aware of its limitation.

Again, lawyers will observe that the good that comes from one kind of beneficence may conflict with the good that comes from obligations imposed by other applications of beneficence. By way of example, in *Korematsu v. United States*,<sup>62</sup> the fact that the petitioner was a loyal American citizen did not mean that all citizens were loyal to the United States during World War II and, therefore, above suspicion. The goal of achieving liberty for most Japanese-American citizens would not contribute by itself to the legitimate national security interests of a government waging war against a foreign enemy which received substantive support from domestic subversives. Do principles-based systems therefore offer any resolution of these competing efforts to seek different goods? The principle of justice seems a likely candidate to provide assistance, if not a solution, to the predicaments which have so far emerged from the applications of the first three principles.

Justice has been understood through a wide range of understanding in rules or principles-based systems. For Mill, justice was the utilitarian calculus of the greatest good for the largest number.<sup>63</sup> For H. L. A. Hart, it is treating like cases alike.<sup>64</sup> For Rawls, it is the exercise of fairness.<sup>65</sup> Others have seen justice as a synthesis of rewards, punishments, and entitlements.<sup>66</sup> Hart's understanding of justice (like cases being treated alike, different cases being treated differently) constitutes what has been termed as "formal justice."

Does the principle of justice really reconcile the conflict so that the other party or side also receives the respect and dignity which it desires? My answer is probably not if our civil legal system of rules and the judgments based on those rules is content with rendering decisions that simply make winners and losers without considering other relevant factors that

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58. *Id.* at 195.

59. *Id.*

60. *Id.* at 203.

61. *Id.* at 205. See also GLENDON, *supra* note 30, at 76-88 (discussing a moral obligation to take action like the Good Samaritan even though there is no legal obligation to do so).

62. 323 U.S. 214 (1944).

63. John S. Mill, *Utilitarianism*, in THE PHILOSOPHY OF JOHN STUART MILL: ETHICAL, POLITICAL, AND RELIGIOUS 335 (Marshall Cohen ed., 1961).

64. H. L. A. HART, THE CONCEPT OF LAW 158 (1961).

65. JOHN RAWLS, A THEORY OF JUSTICE 111-14 (1971).

66. See BEAUCHAMP & CHILDRESS, *supra* note 49, at 257.

go to the heart of a virtue-based method. Does this mean that there is no adequate solution founded on principles-based ethics which can give individuals who are represented by lawyers and are in conflict with one another the justice they deserve? The conflicts between principles-based arguments advanced by some members of the legal profession suggest not. My point here is not to remake a principles-based ethical system that will provide such justice. The task would be a most difficult one indeed. Rather, I propose to look for the answer to this conflict of absolutes in a virtue-based system.

As a member of the legal profession, each lawyer can profit from the experience which members of other professions have had in situating rules and virtue within their respective professions. Members of the medical profession have addressed how virtues and virtue-based approaches to professional issues can contribute to the betterment of health providers, patients, and society at large. The medical ethicist Edmund Pellegrino has offered insight which can provide lawyers with wise counsel worth taking to heart:

A virtue-based ethic is inherently elitist, in the best sense, because its adherents demand more of themselves than the prevailing morality. It calls forth that extra measure of dedication that has made the best physicians in every era exemplars of what the human spirit can achieve. No matter to what depths a society may fall, virtuous persons will always be the beacons that light the way back to moral sensitivity; virtuous physicians [and lawyers] are the beacons that show the way back to moral credibility for the whole profession.<sup>67</sup>

Pellegrino points to the dedication that makes a person the best in one's profession not only on a technical level for a specific patient, but also on the level of doing better for the entire community which the professional serves. This extra measure of dedication might consequently help the legal professional intensify the effort to achieve the goal of giving justice through the reconciliation of conflict and the promotion of "concord" or harmony.

But to do justice, to render good decisions, to be as Dr. Pellegrino suggests an "exemplar of what the human spirit can achieve,"<sup>68</sup> a lawyer must cultivate the virtue of wisdom. Wisdom enables the lawyer to discern what is at stake, to understand more clearly the concerns of those for whom a case means so much. In the realm of late twentieth century America, a virtuous lawyer cannot be satisfied with having some command of the case, the rules, and the parties whose vital interests are involved. The wise lawyer, I suggest, must have both the capacity and the will to see the case, the law, and the parties not only clearly and with an open-mind; the virtuous lawyer must also see these things as they apply to the history of the law, the building of judicial precedent, and the evolu-

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67. Edmund Pellegrino, M.D., *The Virtuous Physician, and the Ethics of Medicine*, in VIRTUE AND MEDICINE 252 (Earl Shelp ed., 1985).

68. *Id.*

tion of the law as a coherent means of reconciling conflict both for today and for the future.

Attributes often cited as those needed by good lawyers to reconcile differences and to resolve conflict are patience, intelligence, integrity, fairness, and open-mindedness. These attributes relate to the virtues that facilitate attaining the just goal. Through personal patience, attentiveness, open-mindedness, self-restraint, seeking the truth, and integrity that avoids even the slightest suspicion of prejudice for or against any specific party, a lawyer is apt to see not only a way but a better way to resolving a case, to reconciling conflict, to seeking the just end.

In some cases, pressure from the media, clients, other lawyers, and even judges may restrain the virtuous lawyer from acting virtuously. The virtue of courage keeps the open-minded lawyer from being swayed or prejudiced by any pressure that could promote deviation from seeking the just end. Courage, quite simply, is the virtue which steels the person to meet the challenges that endanger or threaten the lawyer who must survive the tide of strong public sentiment in order to protect those who need protection.<sup>69</sup> In order to achieve or at least seek justice, there can be instances when a lawyer may have to stand alone and point out that one's colleagues—and perhaps even the nation—are wrong. Precedent for this virtue extends back to the Ancient Near East in which the "governing elite had a very special responsibility for the lower fringes of society . . . ." <sup>70</sup>

Examples of lawyers having the courage to stand apart from the majority of their colleagues as well as the majority of strong, popular sentiment were Justices McLean and Curtis who dissented in the antebellum case of *Dred Scott v. Sanford*,<sup>71</sup> which declared that blacks were not to be considered "citizens" for purposes of Constitutional protection.<sup>72</sup> Another example of courage was the first Justice Harlan who, in *Plessy v. Ferguson*,<sup>73</sup> disagreed that the "separate but equal" doctrine was Constitutional.<sup>74</sup>

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69. See MACINTYRE, *supra* note 15, at 179, where the author states:

We hold courage to be a virtue because the care and concern for individuals, communities and causes which is so crucial to so much in practices requires the existence of such a virtue. If someone says that he cares for some individual, community or cause, but is unwilling to risk harm or danger on his, her or its own behalf, he puts in question the genuineness of his care and concern. Courage, the capacity to risk harm or danger to oneself, has its role in human life because of this connection with care and concern.

In a small footnote which frequently eclipses the legal significance of the case in which it appeared, the United States Supreme Court provided one arena in which a judge may have to have courage to go against the tide to protect the unpopular, the minority, or the outcast. As the Court said in 1938, a "more searching judicial inquiry" may be needed to protect "discrete and insular minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

70. NORBERT LOHFINK, S.J., *OPTION FOR THE POOR: THE BASIC PRINCIPLE OF LIBERATION THEOLOGY IN THE LIGHT OF THE BIBLE* 18 (1987).

71. 60 U.S. (19 How.) 393 (1856).

72. *Id.* at 529 (McLean, J., dissenting); *id.* at 564 (Curtis, J., dissenting).

73. 163 U.S. 537 (1896).

74. *Id.* at 552.

More recently, there were the dissents of Justices Murphy, Roberts, and Jackson in the Japanese-American internment cases which were commonplace during World War II.<sup>75</sup> Courage was not the sole virtue possessed by these lawyers as will be seen in Part VI, below.

## V. ANOTHER DIGRESSION: THREE QUESTIONS

I believe that virtue-based ethics is an appropriate realm within which we might find a more satisfactory solution to the difficult legal questions of the day. In order to set this claim out, I shall now address three preliminary matters. The first is to show that the distinction between rules and virtues (or between the right and the good) is not absolute; for the right and the good to be understood properly, it is necessary to see their relationship to one another as well as their differences. Second, once their relationship is established, the question begins to surface regarding whether the legal reasoning needed to understand the rules and apply them to achieve just results is a form of moral reasoning or not. Since I shall demonstrate that legal reasoning must contain moral reasoning, a third issue presents itself: Does the (virtuous) lawyer always have a duty to follow and obey the law?

### A. THE VIRTUOUS LAWYER DISTINGUISHES BETWEEN THE RIGHT AND THE GOOD

Traditionally the distinction between the right and the good has been viewed as the distinction between deontological and teleological ethical and moral systems. The right is concerned with principles or rules, whereas the good is concerned with goals.<sup>76</sup> In *A Theory of Justice*, John Rawls made the contrast by considering the good as emerging from utilitarian concerns whereas the right does not.<sup>77</sup> But is this distinction simply between the separate entities of the right on the one hand and the good on the other? Is it simply a difference between utilitarian and nonutilitarian considerations? It is important for the virtuous lawyer to understand that there can be overlap and complement as well as distinctions between the right and the good which are often ignored.

Rawls's contribution is a useful start for examining the distinction between the right and the good and how both relate to the virtuous lawyer. A major argument Rawls raised is that the individuals consigned to the

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75. *Korematsu*, 323 U.S. at 214; *id.* at 225 (Roberts, J., dissenting); *id.* at 233 (Murphy, J., dissenting); *id.* at 242 (Jackson, J., dissenting).

76. See W. D. ROSS, *FOUNDATIONS OF ETHICS* (1939) [hereinafter ROSS, *FOUNDATIONS OF ETHICS*] and W. D. ROSS, *THE RIGHT AND THE GOOD* (1930), for a detailed discussion of the traditional view of the right and the good. Ross's *Foundations of Ethics* was an effort to update, confirm, and revise the earlier views on moral theory which first appeared in *The Right and the Good*. Ross reached the conclusion that, while moral goodness and rightness are independent in some ways, a morally good action can be the right action in some circumstances. As will be seen with Rawls and Kymlicka, Ross earlier saw a connection between the right and the good in some, but not all, situations. ROSS, *FOUNDATIONS OF ETHICS*, *supra*, at 309.

77. RAWLS, *supra* note 65, § 68.

"Original Position" would eschew utilitarian considerations and would opt for the two principles of justice which are geared more to the right than to the good.<sup>78</sup> The keystone of Rawls's edifice of justice-as-fairness avoids any movement toward the teleological which he believes utilitarianism makes.<sup>79</sup> Rawls observed that the utilitarian principle of achieving the maximum good runs counter to the principle of justice because it makes no effort to improve the conditions of the least well-off member of the community. Because of this, Rawls concludes that "in justice as fairness the concept of right is prior to that of the good."<sup>80</sup>

To reinforce his point, Rawls proposed several contrasts between the right and the good. His first distinction is that considerations about rational choice and deliberative rationality focus on how each person pursues personal interests and goals once the two principles of justice are in place. In other words, there is no need for principles about rational choice because each person will be entitled to plan his life in accordance with the two justice principles; rational choice succeeds rather than precedes the justice principles. The goods and the goals must be a function of justice, not *vice versa*.<sup>81</sup>

The second contrast made by Rawls is that his conception of the right (*i.e.*, the principles of justice) is uniform whereas conceptions of the good can take on a variety of manifestations because they are determined by individual rational choice. The good for one person may very well be substantively different from that for another person because variety characterizes rational choice; however, the right for each person is conditioned by the justice principles which are not expressed by variety.<sup>82</sup>

A third contrast offered by Rawls centers on the point that the exercise of rational choice and pursuit of the good require access to the facts and conditions of a person's position in life whereas the exercise of the right (*i.e.*, the justice principles) is restricted by the veil of ignorance.<sup>83</sup> Rawls improvised on this distinction by introducing a subtlety here: once the justice principles are "discovered" but before individuals pursue their personal goods, the construction of constitutions and basic political/social arrangements needs more information than is available under the veil of ignorance but less than is required by individuals when pursuing the goods for their lives. Another subtlety offered is that rational choice and pursuit of the good are evolving or dynamic (organic),<sup>84</sup> whereas exercise of the right is static.<sup>85</sup> One final distinction initially suggested by Rawls is that the exercise of rational choice and the pursuit of goods is compara-

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78. *Id.* at 29.

79. *Id.* at 30.

80. *Id.* at 31.

81. *Id.* at 446.

82. *Id.* at 447-48.

83. *Id.* at 448-49.

84. I use the term "organic" in a sense similar to that used by ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 209 (1974).

85. RAWLS, *supra* note 65, § 68.

tive, that is, the seeking and choosing of goals rely on comparing and contrasting diverse options. The exercise of the right is much more uniform. It is antithetical for the right to rely on comparisons; the rules or principles of justice consist of an integrity that is opposed to variety.<sup>86</sup>

But how strongly these distinctions can be followed presents several major challenges to Rawls's initial views about the right being prior to the good. Will Kymlicka has sifted through the questions posed by these distinctions and has provided a framework for answering them—a framework which establishes why the good, why the virtuous is vital to developing an understanding of justice and the system of justice with which lawyers are inextricably involved. Kymlicka hastened to question whether there is any real issue regarding the priority of one over the other.<sup>87</sup> Much of his criticism of Rawls was independently addressed by Rawls himself when he, Rawls, recognized and examined several connections between the right and the good not previously made.

However, it will help to first address Kymlicka's critique of the initial views of Rawls. Kymlicka maintains that the contrasts which Rawls proposed in *A Theory of Justice* confuse rather than clarify the issues of the right and the good. I propose to take Kymlicka's critique as a means of sharpening rather than denying the points initially made by Rawls in 1971 concerning distinctions between the right and the good.

Kymlicka's first criticism argues that Rawls improperly conflated teleology and utilitarianism since Rawls concluded that utilitarians ignore the full moral significance of the distinctness of persons because they do not account for the distinctness of persons.<sup>88</sup> Kymlicka showed that Rawls was mistaken in this view because what is at issue is not the distinction between people and their individual claims, but the equality given to each individual's claims in formulating principles of justice. Moreover, Kymlicka convincingly argued that utilitarianism can be a deontological theory which Rawls denied.<sup>89</sup> Yet Rawls was concerned about a fundamental level of equal consideration for each person, and this, argues Kymlicka, is consistent with the political morality of utilitarianism as a deontological theory of equal consideration.<sup>90</sup>

Kymlicka directed his second criticism at Rawls's contrast pertaining to a fair distribution of the good which is at the heart of justice-as-fairness. Ultimately, Kymlicka advocates that the real distinction depends not on distribution but on the "proper definition of the good."<sup>91</sup> Since Rawls avoided imposing a particular view of the good on people, his theory leads to variety (the "thin theory of the good") in the goods people may choose.<sup>92</sup> This accords with Rawls's nonperfectionist theory of society

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86. *Id.* § 84.

87. WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 21 (1991).

88. *Id.* at 32.

89. *Id.*

90. *Id.*

91. *Id.* at 33.

92. *Id.*

where he sees that essential human interests will be less limited and more protected by nonperfectionism. Rawls believed that perfectionist theories are geared to goods (teleology) rather than principles (the right). But this concern obscures an important as well as accurate understanding of the nature and relationship of the right and the good.<sup>93</sup> Kymlicka referred to Rawls's questionable position that perfectionists are primarily concerned with maximizing "their preferred good."<sup>94</sup> Kymlicka demonstrated how perfectionists and nonperfectionists do not simply adhere to one basic view apiece. Just as there is variety among the views of nonperfectionists, so there is variety of views among perfectionists. This being the case, it is possible for both teleologists and deontologists to pursue a variety of goals (goods).<sup>95</sup>

As earlier mentioned, Kymlicka's critique must be reconsidered in light of Rawls's 1980 article, *The Priority of the Right and Ideas of the Good*.<sup>96</sup> While not responding directly to Kymlicka's objections, Rawls accounted for some of his criticisms. Like Kymlicka,<sup>97</sup> Rawls discovered that the right and the good may be more complementary than he originally suggested in *A Theory of Justice*. While still remaining prior in Rawls's estimation, the right is not completely sealed off from the good. Connections between them can be observed on two levels: the first is through the principles of justice themselves which influence the exercise of rational choice and the goods pursued by individuals; the second is through the constraints imposed by social and political institutions on the exercise of rational choice. Rawls conceded that for the principles of justice to enhance liberty, the limits placed on the exercise of rational choice cannot be too restrictive.<sup>98</sup>

Although in *A Theory of Justice* Rawls made more of the distinction of than the relationship between the right and the good, he subsequently acknowledged a link between an individual's exercise of rational choice and pursuit of the good and the constraints imposed on these choices by the political and social institutions generated by the principles of justice. But in making this connection, Rawls implicitly and paradoxically recognized some further distinctions between the right and the good—an acknowledgment that is vital to the virtuous lawyer. While Rawls attempted to show how "admissible ideas of the good" respect the priority of the right and the political conception of justice,<sup>99</sup> he identified several distinctions which demonstrate dependence and relationship between the two—a dependence which makes an important and, I submit, vital connection between justice and virtue.

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93. *Id.* at 35.

94. *Id.*

95. *Id.*

96. JOHN RAWLS, *THE PRIORITY OF THE RIGHT AND IDEAS OF THE GOOD IN POLITICAL LIBERALISM* 174 (1993).

97. KYMLICKA, *supra* note 87, at 21.

98. RAWLS, *supra* note 96, at 174.

99. *Id.* at 176.



The first distinction focused on goodness as rationality. In targeting their goals in life, individuals generally exercise rationality. But some exercises of rationality can restrict the specific aims identified by each person. While an individual may reasonably desire a particular goal, rationality ultimately cautions against some goals because they conflict with the principles of justice or they may be prohibited by social and political structures erected by the principles. This distinction emerges more sharply when we see the difference between plain rational choice versus rational choice that is subject to institutions which are conditioned by the right. Plain rational choice can lead an individual to elect a particular good, but rational choice exercised in accordance with the right may identify the selection as a good not worth pursuing or incapable of being pursued because it conflicts with the principles of justice or their political and social institutions.<sup>100</sup> In itself, this distinction does not help the argument I am attempting to make. However, this is where the second distinction becomes significant.

The second distinction extends from the first and emerges from the manner in which individuals select primary goods as contrasted with the method used by citizens. Rawls distinguished between *individuals* (persons who manifest little interest in their culture and society) and *citizens* (persons, like the virtuous lawyer, who are or might be very concerned about those with whom they share in a community of interdependent individuals). Both individuals and citizens exercise rational choice in the identification and selection of primary goods. But individuals choose primary goods independently of any external factors including relationships with those other persons with whom they share a community. Citizens, on the other hand, choose them in accordance with the rights and duties imposed by social and political institutions founded in accordance with the justice principles. The person *qua* individual and the person *qua* citizen do not operate under the same rational scheme for identifying primary goods. The citizen's selection of primary goods will necessarily be influenced by those primary goods "advantageous for all" whereas the individual would select primary goods without this influence. The rational choice which assists the citizen in selecting primary goods consequently bears the hallmark of mutuality: what is good for one agent can be good for other agents. This is absent in the exercise of rational choice by the individual. Thus, the selection of primary goods by the citizen bears a social component; that of the individual does not.<sup>101</sup>

The distinction between the individual and the citizen provides the foundation for a further contrast between the good and the right. The citizen—such as the lawyer—is a member of social and political institutions. Lawyers who exercise rational choice in the selection of goods do so in accordance with political virtues—"virtues of fair social cooperation such as the virtues of civility and tolerance, of reasonableness and the

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100. *Id.* at 176-78.

101. *Id.* at 178-90.

sense of fairness.”<sup>102</sup> A citizen (such as the virtuous lawyer) is guided by a sense of public virtue which permeates one’s exercise of rational choice with freedom, equality, and social cooperation; the individual, on the other hand, does not rely on these virtues.<sup>103</sup>

A critic of my interpretation might argue that these distinctions lead to a perfectionist state (presumably inhabited and controlled by virtuous people) to which Rawls is opposed.<sup>104</sup> This objection can be countered by the recognition of a further distinction which follows from the previous three.<sup>105</sup> While citizens and individuals share an interest in seeking goods, the concept of the good for the citizen implies the good for all. The nexus between the good for one member and the other members of the society raises the concept of the good of the political society which is intertwined with the good of the citizen. This is where Rawls’s final distinction concerning “the idea of the good of a well-ordered (political) society” comes into play.<sup>106</sup> These interrelated concepts do not necessitate the ideal political community; they do, however, show that citizens who exercise their rational choice do so for themselves and the well-ordered society. The point here is that citizens seek goods for themselves and others which are not predetermined by principles but are determined by a “social” rational choice that relies on the virtuous qualities of the citizen.

As Rawls experienced an evolution in his belief about the priority of the right over the good, he adopted a view acknowledging certain connection and compatibility between the two. The connection hinges on the role of virtue in the life and action of the citizen. The question to be addressed now is what do these distinctions mean about the relationship between the right and the good? Is Rawls still correct in maintaining the deontological priority once he admitted the connection between the two? Or are the subsequent distinctions which he raised after he modified the views contained in *A Theory of Justice* more cosmetic than substantive?

While the right and the good overlap in some areas, they are distinguishable in others. In the final analysis, the distinctions are better understood if seen as those of emphasis rather than separation. The distinctions between the right and the good, while several, are of degree rather than kind. As Kymlicka correctly pointed out, there is no real issue “about which of the right and the good is prior.”<sup>107</sup> When the distinctions between the two are analyzed, it becomes clear that the connections and interrelationships between the good and the right outweigh the dif-

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102. *Id.* at 194.

103. *Id.* at 190-95.

104. See STEPHEN MULHALL, *LIBERALISM AND COMMUNITARIANS* 32 (1992). This author takes this point further. He argues that liberals like Rawls who oppose perfectionism present a view of social and political institutions which unite rather than separate people’s good with the right. As he states, “[T]alk about the priority of the right over the good only serves to conceal this crucial point.” *Id.*

105. RAWLS, *supra* note 96, at 201-06.

106. *Id.* at 201.

107. KYMLICKA, *supra* note 87, at 21.

ferences. The right and the good, when all is said, are different but also interdependent and complementary. The contrasts between the two are of degree, not substance; they reveal as much about unity as they do about separation. The virtuous citizen or lawyer who possesses and exercises the virtues of wisdom, courage, compassion, and prudence will be able to achieve justice in hard cases because of his recognition of not only the distinction between the right and the good but also of their interdependence as well.

#### B. WHAT IS CONSTITUTIVE OF THE VIRTUOUS LAWYER'S LEGAL REASONING?

Of course, this last point raises the question about the role of morality in the process leading up to making the just decision in hard cases. Another way of framing the issue is to determine the extent to which the legal reasoning exercised by any lawyer is simply a technical function that is pursued the same ways by the nonvirtuous lawyer as well as the virtuous. But another set of questions surfaces: is it important to consider the role which moral consideration plays in the search and implementation of justice? Must moral considerations play a role in the reasoning process of the lawyer as he seeks justice? The question takes on further significance as one ponders the statement made by Robert George: "Laws cannot make men moral. Only men can do that; and they can do it only by freely choosing to do the morally right thing for the right reason."<sup>108</sup>

From what I have said so far, it would seem logical to argue that a lawyer must incorporate moral considerations when he seeks the goal (the good) of justice. It would also appear that the virtuous lawyer is a moral reasoner who focuses on the good rather than simply the rule/right. However, one commentator, John Finnis, has suggested that legal reasoning, in large part, is technical rather than moral reasoning.<sup>109</sup> This assertion raises the issue about the separation between law and morals: is the separation real and necessary, or is it a fiction and unnecessary? The virtuous lawyer must find an answer to these questions. The virtuous lawyer may well be acquainted with Ronald Dworkin's lawyer-judge Hercules who is gifted with "superhuman skill, learning, patience, and acumen."<sup>110</sup> Unlike Hercules, the virtuous lawyer can make no claim to being other than human. Of greater influence to the virtuous lawyer is the model constructed by Judge Cardozo who argued that a conscientious lawyer-judge is like the "wise pharmacist" who must balance and combine a variety of ingredients including logic, history, custom, and a sense of right in order to arrive at a just decision.<sup>111</sup> As the virtuous lawyer searches for rational approaches to legal reasoning, he is aware of the

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108. ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 1 (1993).

109. John Finnis, *Natural Law and Legal Reasoning*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 134, 142 (Robert George ed., 1992).

110. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105-06 (1978).

111. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 162 (1921).

contributions made by positivism and natural law. But when confronted with Finnis's statement, the virtuous lawyer is perplexed. Is Finnis really claiming that moral reasoning has little part in legal reasoning and the legal process? Realizing that Finnis's concept of practical reasonableness underlies legal reasoning by raising the fundamental moral issue about what *ought* to be done,<sup>112</sup> the virtuous lawyer concludes that there is more to Finnis's statement.

As a conscientious person, the virtuous lawyer considers that he must participate in difficult cases which defy easy solution. What the virtuous lawyer must do initially is apply a corpus of relevant judicial precedent and other authority such as statutes and regulations to each case. Some of this work is technical, perhaps even mechanical in the application of relevant precedent and other authorities to each factual context. But this does not preclude probing the moral issues within difficult cases. Unlike Dworkin's Judge Hercules who searches for one right answer,<sup>113</sup> the virtuous lawyer acknowledges that there may well be several viable solutions (several appropriate answers) for difficult cases. The question which the virtuous lawyer must address, then, is what considerations must be pursued to ascertain the better solutions among these viable alternatives? While the virtuous lawyer questions Hercules's claim of one right answer, he also wonders whether there is more to legal reasoning than is suggested in Finnis's quotation. Surely legal reasoning cannot simply be an exercise in which rules are mechanically applied to difficult cases. If this were so, reasonable lawyers would be able to find solutions based on technical rules before the difficult cases ever get to court.

The virtuous lawyer notes the disagreement between Finnis and Dworkin: there simply cannot be one "right" answer to hard cases.<sup>114</sup> What makes cases like *Plessy*, *Dred Scott*, and *Korematsu* hard is that they established harsh precedents which were law that "had" to be followed until altered or reversed. Indeed, Finnis acknowledges that there is more to adjudication and the legal process than technical reasoning. While the reasoning process which lawyers and judges must follow is, in part mechanical or technical, it does not preclude an investigation about the important moral questions that often permeate hard cases (like those of

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112. FINNIS, *supra* note 33, at 12.

113. RONALD DWORKIN, *LAWS EMPIRE* 257-58 (1986). Dworkin elaborates upon his "one right answer" thesis in Chapter 5 of RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1979). Dworkin introduces Hercules in his *Taking Rights Seriously*, where he describes his mythical judge as follows:

[A] lawyer of superhuman skill, learning, patience and acumen . . . [who] is a judge of some representative American jurisdiction. . . . [Hercules] accepts the main uncontroversial constitutive and regulative rules of the law in his jurisdiction. He accepts . . . that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier decisions of their court or higher courts whose rationale, as lawyers say, extends to the case at bar.

DWORKIN, *supra* note 110, at 105-06.

114. Finnis, *supra* note 109, at 143-44.

*Dred Scott*, *Plessy*, and *Korematsu*).<sup>115</sup> The virtuous lawyer is convinced that it is precisely in the hard cases where moral reasoning is often necessary to reach justice. Finnis conceded that moral investigation is a component of the legal and judicial processes: it is the "backbone" of legal reasoning, and it helps shape the enterprise.<sup>116</sup> The search for objective moral truth is vital to deciding hard cases because this investigation is constitutive of ascertaining "the most basic human rights."<sup>117</sup> In the final analysis, Finnis recognized a logical nexus between addressing moral issues and legal reasoning. This connection becomes evident when the virtuous lawyer discovers that identification of the moral is rationally determined. This connection becomes increasingly manifest as judges and advocates become more deeply involved with legal reasoning.

The virtuous lawyer is puzzled by Finnis's suggestion that legal reasoning is largely technical rather than moral because of Finnis's acknowledgment of the connection between morality and law. What furthers justice and human flourishing (two concepts of great importance to Finnis) cannot be determined by exclusive reliance on technical reasoning. Justice and human flourishing must ultimately incorporate "a principle of fairness" based not on a separation but rather a synthesis of legal and moral reasoning.<sup>118</sup> For Finnis, reason deprived of moral consideration will never in itself determine what is just, what is the "greater good and lesser evil."<sup>119</sup> The virtuous lawyer can be satisfied that the question raised by Finnis is rhetorical, but he also wonders if there are other explanations about the separation of and connection between law and morals.

Jeremy Waldron has presented a useful inquiry into the relevance of moral issues to legal reasoning. Waldron formulated his investigation by raising questions about the relevance of moral realism to legal decision making. Ultimately, he saw that any link between the moral and the legal is specious, and he concluded that moral decision making by lawyers and judges is inappropriate.<sup>120</sup> Waldron has also criticized Dworkin's belief that Hercules can find one right answer to hard cases. But Waldron's reasons differ from those of Finnis in large part due to his argument that moral discourse is riddled with subjective indeterminacy such that it cannot effectively contribute to the judicial process and the legal reasoning. The gist of Waldron's complaint is that lawyers and judges who claim to arrive at moral decisions often arrive at different decisions which conflict with the claims of others who also believe that their conclusions are moral.<sup>121</sup> In the final analysis, it is not the lawyer's or judge's moral subjectivity that Waldron sees as being fatal to moral claims; rather, it is the

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115. *Id.* at 142.

116. *Id.* at 148.

117. *Id.*

118. As Finnis argues, "moral absolutes give legal reasoning its backbone" and "moral absolutes are rationally determined." *Id.*

119. *Id.* at 151-52.

120. Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS*, *supra* note 109, at 163.

121. *Id.* at 183-84.

disagreement among the variety of conflicting moral claims that lawyers can and do make.<sup>122</sup> The virtuous lawyer can appreciate Waldron's critique and contribution, but he is troubled by the strength of his opposition, perhaps even hostility, to the claim that there is a connection between law and morals. Even H. L. A. Hart implied some "point of necessary intersection between law and morals" when he critiqued the utilitarians' "emphatic insistence" on the separation of law and morals in legal reasoning.<sup>123</sup>

Robert Alexy presented a counterpoint to the views of Waldron when he argued that there is a conceptually necessary connection between law and morality. He contended that individual legal norms and decisions, along with entire legal systems, connect law and morality through their respective claims to correctness.<sup>124</sup> In other words, legal concepts necessarily possess an ideal component which links the law with a procedural and universal morality. Unfortunately, Alexy's argument is somewhat circular: he attempts to refute the positivist's claim which denies "any conceptually necessary connection between law and morality on an analytical level" with what he claims to be the nonpositivist argument "that there is *no* conceptually necessary connection between law and morality whatsoever."<sup>125</sup> Alexy's goal of identifying connection through the mutual claim of correctness made by law and morality is inviting, but his circular argument of using a negative to disprove a negative is cumbersome.

The virtuous lawyer may turn to the evaluation of the moral component of legal reasoning made by Neil MacCormick who has retreated from his earlier attraction to "the separation of law and morals" thesis. MacCormick has spanned the gap between the moral and the legal generated by Waldron's thesis when he identified a "necessary connection" between law and morality that avoided his previous detection.<sup>126</sup> This nexus is manifested in those legal systems which aspire to just decisions. The reasoning leading to just decisions tends to rely on compromise between and tolerance of the respective positions of the parties to the legal dispute. This connection between law and morals, while weak, is still significant for MacCormick.<sup>127</sup> But it is also practical because law and morality share concerns about how individuals—and lawyers who represent these individuals in hard cases—must ultimately live together in soci-

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122. *Id.* at 184.

123. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, reprinted in H. L. A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49, 64 (1983). But see Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958), for Professor Fuller's response which develops an inextricable relationship between law and morality.

124. Robert Alexy, *On Necessary Relations Between Law and Morality*, 6 RATIO JURIS 167, 168-69 (1989).

125. *Id.* at 170 (emphasis added).

126. Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS, *supra* note 109, at 113.

127. *Id.* at 118.

ety.<sup>128</sup> Like the virtuous lawyer, MacCormick saw the promising link between morality and law in their mutual, practical interests to resolve conflict and to establish a just result.<sup>129</sup> The quest for a just result suggests the existence and necessity of a legal order in the human community called the Rule of Law. What bolsters the Rule of Law for both MacCormick and the virtuous lawyer is found in the consensus that the Rule must be practically oriented toward an efficiency that is fair, determinate, good, and just.<sup>130</sup> The virtuous lawyer realizes that if the Rule of Law is not geared to this efficiency, individuals in conflict may turn to alternative methods of resolving their disputes which avoid the elements of practical reasoning shared by law and morals.

While MacCormick's approach contains promise, the virtuous lawyer searches for a clearer presentation of just how the moral and the legal come together in the legal reasoning that must be the "backbone" of his exercise of the judicial process. Joseph Raz has supplied assistance with his argument that legal reasoning is reasoning which either signifies what the law is or suggests how legal disputes "should" be resolved consistent with the law.<sup>131</sup> The appeal of Raz's view is that it is not restricted to how "ideal" lawyers (such as Dworkin's Hercules) approach the law and legal reasoning; it is a process which reasonable persons concerned with the law can accept and implement.<sup>132</sup>

The core of Raz's argument identifying and explaining the connection between legal and moral reasoning concentrates on the question: How, when all (not just legal) matters are considered, should cases be decided? Raz carefully distinguishes this "law-plus" investigation which he claims to be a moral one from the "law-only" issue. For Raz, the question "How, according to the law, should cases be decided?" is not necessarily a moral question.<sup>133</sup> This distinction suggests that morality is a background consideration which lawyers should resort to as a function of being rational agents. As one thinks about resolution of a legal dispute, human reflection will engage a variety of values, some of which are moral.<sup>134</sup> The virtuous lawyer is attracted to considering the Razian scheme to assess (1) whether legal reasoning raises moral questions and (2) whether it can be modified or reformed because of moral objections. Reinforcing the attractions of this scheme is the virtuous lawyer's acknowledgment that the law and legal reasoning are human institutions

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128. *Id.*

129. *Id.* at 120. In his earlier work, MacCormick noted that moral reasoning is not a "poor relation of legal reasoning." *Id.* at 272. Rather, he insisted that "legal reasoning is a special, highly institutionalized and formalized type of moral reasoning." *Id.* For MacCormick, the legal and the moral necessarily share parts of the same social setting. NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 272-74 (1978).

130. GEORGE, *supra* note 108, at 121-25.

131. Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 *RATIO JURIS* 2 (1993).

132. *Id.* at 2-3.

133. *Id.* at 3.

134. *Id.* at 5.

and therefore not above or beyond moral evaluation.<sup>135</sup>

Although the virtuous lawyer does not automatically assume a connection between law and morality, neither does he view the law and legal reasoning as hermetically sealed from moral considerations and moral reasoning. This is a crucial distinction which should be considered in assessing the traditional Benthamite and Austinian views about the separation of law and morals.<sup>136</sup> Raz avoids Alexy's vulnerable necessary connection argument by acknowledging a body of technical legal rules which range in degrees of independence from moral considerations. At the same time, Raz further acknowledges the existence of a second corpus of law (distinct from technical rules) which is subject to varying degrees of moral evaluation and reasoning.<sup>137</sup>

But the skeptic may raise another objection to the argument that there is a nexus between legal and moral reasoning. If a portion of the law is independent of and autonomous from moral reasoning, can this segment be expanded to demonstrate that most legal cases involving disputes between people can be decided without any need for moral reasoning? The virtuous lawyer must answer this question in the negative. The technical considerations which insulate some aspects of legal reasoning from moral evaluation cannot be applied to the substantive issues of human conflict which emerge in the disputes that are at the core of legal cases. Otherwise, this would lead to a mechanical jurisprudence which is ill-suited for resolving these difficult issues where moral reasoning is essential. In these cases, the facts, the equity of the parties' positions, and other relevant considerations would be overshadowed and perhaps even eliminated by this mechanical approach to legal reasoning. Like the Cardozian jurist,<sup>138</sup> the virtuous lawyer does not think that Raz endorses such an approach. While Raz does not make the point directly, the virtuous lawyer develops Raz's approach in the assumption that litigants and their legal representatives are rational and reasonable. If this assumption is correct, then the conflict about the meaning of the law in each case is usually not a disagreement between illogical or irrational persons, but rather is between rational and logical ones. Notwithstanding their rationality, the litigants disagree over the meaning of the law as it applies to their dispute. The virtuous lawyer sees that the law itself does not contain an internal mechanism that automatically resolves the disagreement between these rational agents. But the law has been established by people as the body of general rules to guide and regulate how they live together. Consequently, the virtuous lawyer must expand the reasoning about the meaning of the law in such cases, and reliance on background moral considerations essential to how these people can restore the ability to live

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135. *Id.* at 6.

136. Hart, *supra* note 123, at 50.

137. Raz, *supra* note 131, at 10.

138. *Id.*



in right relationship with one another may be necessary for just resolution of interpersonal disputes.

Ultimately, the virtuous lawyer sees that legal and moral reasoning are not separate enterprises. While some legal reasoning is not based on moral reasoning (particularly when the questions focus on technical matters such as general procedure), this does not automatically lead to the conclusion "that legal reasoning is impervious to moral reasons."<sup>139</sup> Although moral reasoning need not permeate the entire process of legal reasoning, neither is it completely absent from the process. A strict separation of law and morals is a doctrine which has little bearing on the lawyer's contribution to the legal process. Especially in those difficult cases where reasonable people credibly argue conflicting understandings about the meaning of the law, the virtuous lawyer concludes that what clarifies the meaning of the law in such a context is the background consideration of its moral justification. While reasonable people, including reasonable lawyers, may dispute what is the particular moral justification reinforcing the meaning of the law, there is considerably less disagreement that it is a moral justification which underlies our understanding of the law and the legal reasoning which supplies that understanding in hard cases. But when we get to the hardest of cases and the moral and virtuous lawyer seems to be boxed in by what the law demands, must the virtuous lawyer disobey the law in order to remain virtuous?

### C. DOES THE VIRTUOUS LAWYER ALWAYS HAVE A DUTY TO OBEY THE LAW?

There has been much discussion about whether there is an obligation to obey the law or not.<sup>140</sup> The question presented here presumes that there is some obligation on the part of the virtuous lawyer to obey; related to this question is the issue regarding the extent to which this obligation is voluntary. Assuming that some aspects of obedience to the law are mandatory and others are voluntary, how does any obligation to obey the law affect the positions and actions taken by the virtuous lawyer? Philip Soper claims that there is a weak obligation to obey the law in that there is "some moral reason to do what the law requires."<sup>141</sup> The obligation to obey, for Soper, is neither absolute nor irrefutable but *prima facie*. There can be substantive reasons for not obeying an unjust law or not obeying a

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139. *Id.* at 14.

140. Another commentator has investigated and developed the relationship between the responsibility of citizenship and obligation due the law. See T.R.S. Allan, *Citizenship and Obligation: Civil Disobedience and Civil Dissent*, 55 CAMBRIDGE L.J. 89 (1996), where the author argues that legal obligations must be understood in the context of moral judgment. According to Professor Allan, whether a person obeys the law or not is based on a premise that the citizen (presumably this would include the lawyer) will obey the law upon his judgment concerning the law's "purposes and effects." *Id.* at 119. For Allan, the relationship between obedience and disobedience is contingent on the moral basis of the law that appeals to reason rather than the threat of the exercise of force. *Id.*

141. Philip Soper, *The Obligation to Obey the Law*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 127, 132 (Ruth Gavison ed., 1987).

just law in particular circumstances where obedience would constitute injustice.<sup>142</sup> Nonetheless, two points reinforce Soper's claim that there is a moral reason to obey the law. The first is that law is part of a "supremely effective coercive system" that offers its subjects both security and an attractive alternative to the chaos of anarchy; second, the law is defended by its subjects who are the frequent beneficiaries of its ability to coordinate social life and by those whose duty it is to enforce the law.<sup>143</sup> But is the obligation to obey the law always voluntary? Does the concept of voluntariness imply that the action pursued by an individual is done freely and intentionally and not mandated by some coercive authority?<sup>144</sup> It is important to answer these questions in order to assess what position the virtuous lawyer must take in hard cases where the law is either immoral or, if it is not, would dictate a result which is not moral or would achieve an unjust result.

In order to address these issues, it will be helpful to determine what is meant by legal obligation within the context of law and obedience to law. A brief examination of the positions taken by several major contributors to this discussion will frame the investigation. One of the first definitions about legal obligation was offered by Socrates in the *Crito* dialogue. Socrates had been condemned to die because of his violation of Athenian law. But Crito offered Socrates a tempting alternative to death, tempting because contained within the plan for escape was the argument that disobedience to the law would be morally justified in this case. Socrates demonstrated in the *Apology* that the allegations he faced were unsubstantiated and that the law as applied to Socrates was unjust.<sup>145</sup> Crito informed Socrates that his escape could be arranged by payment of a small sum of money. However, Socrates responded that even though he may be wrongly convicted, it would be a greater wrong to take the law into his own hands by escaping from lawfully imposed punishment. For Socrates, the injustice done to him paled in contrast to the violence he would commit against the state by escaping punishment for the unjustifiable conviction. Socrates was committed to the covenantal nature of the law: the citizen once having agreed to the law is bound to it in its entirety, and it would be improper to avoid any of its provisions. The covenants of his day (ancient Biblical or suzerainty treaties) were reciprocal in that they established a voluntary bond between the lord and the vassal, each promising to do something for the other.<sup>146</sup> In such covenants, the

142. Aquinas argues in *Summa Theologiae* that not all human law binds people "in conscience" when such law contravenes God's law, especially where the human law "inflicts unjust hurt on its subjects." AQUINAS, *supra* note 16, at Ia-IIae, Q. 96, art. 4.

143. Soper, *supra* note 141, at 153.

144. Joseph Raz, *Promises and Obligations*, in *LAW, MORALITY AND SOCIETY* 218, 223 (P. M. S. Hacker & Joseph Raz eds., 1977).

145. Plato, *Apology*, reprinted in *GREAT DIALOGUES OF PLATO* 442 (Eric H. Warmington & Philip G. Rouse eds. & W.H.D. Rouse trans., 1956).

146. THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 353 (F. L. Cross & E. A. Livingstone eds., 2d ed. 1974). See also JOSEPH BLENKINSOPP, *WISDOM AND LAW IN THE OLD TESTAMENT* 103 (1995), for further explanation of the mutual and reciprocal relation-

relationship between the parties is characterized by rights and obligations flowing in both directions.<sup>147</sup>

Richard Wasserstrom redefined the question faced by Socrates in his investigation of "the obligation" to obey the law. He reconstructed the question which Socrates faced by testing the claim: "because one does have an obligation to obey the law, one ought not ever disobey the law."<sup>148</sup> Wasserstrom identified the falsehood of assuming that a person has an absolute obligation to obey the law because he demonstrated that there are circumstances which can justify disobedience (such as the case involving the false charges against Socrates). Wasserstrom challenged Socrates's view by claiming that even if one begins with a *prima facie* obligation to obey, disobedience can be morally justified when strict adherence to the law constitutes greater violence to justice than obedience. His point reflects Rawls's view that, while there is a moral obligation (derived from the principle of fairness) to obey the law, such obligation can be overcome by other obligations.<sup>149</sup> The nucleus of Wasserstrom's position is his concern "with moral obligations and morally justified actions."<sup>150</sup> Writing at the time of widespread civil rights demonstrations protesting the evil of segregation, Wasserstrom argued that it is not "inconsistent to assert both that indiscriminate disobedience is indefensible and that discriminate disobedience is morally right and proper."<sup>151</sup> Given the context in which he was writing, the author did not advocate unbridled disobedience; he did advocate, however, that disobedience to oppressive laws directly or indirectly disfavoring some citizens over others could be morally justified. But Wasserstrom did not address the question whether the obligation to obey the law is voluntary when he stated that he is "not at all concerned with the question of why, in fact, so many people do obey the law."<sup>152</sup> Insight about the voluntary nature of obedience to the law must be sought elsewhere.

M.B.E. Smith advanced the bold view that not only is there no obvious obligation to obey the law, there is no *prima facie* obligation to obey any laws of one's government.<sup>153</sup> Smith defined a *prima facie* obligation as one in which a person has a moral reason to obey the law.<sup>154</sup> Absent

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ship between the suzerain and the vassal. For a further view of the relationship between the Biblical Wisdom literature and legal authority, see Bernard T. Jackson, *Modeling Biblical Law: The Covenant Code*, 70 CHI.-KENT L. REV. 1745 (1995).

147. THE OXFORD COMPANION TO THE BIBLE 139 (Bruce M. Metzger & Michael D. Coogan eds., 1993). Interestingly, Joseph Raz implies a connection between covenantal relationship and the political notion of obedience to law when he noted that an obligation to obey can be "the result of a special relationship between an individual and his state." See RAZ, *supra* note 35, at 104.

148. Richard A. Wasserstrom, *The Obligation to Obey the Law*, 10 UCLA L. REV. 780, 782 (1963).

149. RAWLS, *supra* note 65, §§ 52, 53.

150. Wasserstrom, *supra* note 148, at 785.

151. *Id.* at 793.

152. *Id.* at 785.

153. M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973).

154. *Id.* at 951.

some other moral reason which would take precedence over the first to obey the law, a failure to obey the law would be wrong. In Smith's view (which is in sharp contrast with Soper's), debts of gratitude to one's government for supplying basic services and security are insufficient to impose a *prima facie* obligation to obey. Any argument from fair play (which both Hart and Rawls support<sup>155</sup>) is not directed toward the obligation to obey as much as it is directed toward guiding one's relationships with fellow citizens. In addition, offering one's consent to the presence and operation of a government is not a *prima facie* obligation to obey the law. Smith correctly pointed out that virtually every legal system contains either pointless or harmful laws to which citizen's obedience would be either meaningless or detrimental; therefore, avoidance of and possibly disobedience to such laws in some circumstances would be the morally correct thing to do.<sup>156</sup>

While there may be many harmful or pointless laws, there are many others which are either beneficial or neutral in their outcome. Smith appears to agree with Aquinas in stating that some types of disobedience (e.g., against immoral laws) can be morally justified. However, it would be mistaken to conclude that it would always be morally justifiable to ignore or disobey the law, particularly when the law's enforcement is based on moral grounds or when the law generates substantive benefits for all humanity. Moreover, many laws are crucial to coordinating the events of daily life (e.g., most traffic regulations) and obeying them would not be unjust—particularly in an urban setting during rush-hour traffic.<sup>157</sup>

Tony Honoré has offered an important supplement to the discussion. While not answering whether the obligation to obey is voluntary, he addressed the question why individuals should obey the law. He advanced a political argument why there is an obligation to obey: obedience to law is "healthy" because it makes members of a society more mindful that they are conditionally dependent on one another.<sup>158</sup> While Honoré did not dismiss the existence of circumstances which can morally justify disobedience, his position agreed with Soper's that there is a general *prima facie* obligation to obey. The *prima facie* obligation is premised on the existence of myriad complexities found in contemporary life. Honoré argued that because of these complexities, sensible individuals must depend on the existence, implementation, and enforcement of the laws which help people meet these complexities. Putting aside the acknowledgment that the law serves many practical human needs, he did not reach the second

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155. H. L. A. Hart, *Are There Any Natural Rights*, in *POLITICAL PHILOSOPHY* 62 (Anthony Quinton ed., 1967); RAWLS, *supra* note 65, § 53; John Rawls *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY: A SYMPOSIUM* 9-10 (Sidney Hook ed., 1964).

156. Smith, *supra* note 153, at 956.

157. My example of the urban setting could take on a different hue if one were to consider whether a motorist ought to obey all traffic regulations in the dead of night when no other motorists are observed using the streets.

158. Tony Honoré, *Must We Obey? Necessity as a Ground of Obligation*, 67 VA. L. REV. 39, 44 (1981).

component of the question—is the obligation voluntary? Honoré implied that the obligation is not voluntary. He concluded that the obligation to obey is of necessity rather than choice because people are dependent on one another.<sup>159</sup> In his view, people obey the law out of practical necessity.

John Mackie offered an interesting thesis worth considering in the search for defining the degree to which obeying the law is voluntary. His investigation focused on inventing an obligation to obey the law, since in his view, it is impossible to derive an obligation to obey the law.<sup>160</sup> This position in and of itself is not particularly helpful in answering the issue, but Mackie identifies an idea that directs us to an answer. In his re-examination of the *Crito*, he reminds us that Socrates's action was voluntary.<sup>161</sup> Socrates was confronted with a difficult decision which he and Crito viewed differently. The conflicting views of Socrates and Crito illustrate that there can be and often is no strong consensus about how a reasonable, generally law abiding individual should respond to the obligations and responsibilities contained in the law. Mackie understood that reasonable people (this presumably excludes anarchists and hermits who have little or no use for law) "differ in the strength they assign, in a given legal system, to the obligation to obey the law . . . ."<sup>162</sup> But Mackie did not address whether the obedience is coerced, urged through peer pressure, or voluntary. Joseph Raz comes the closest in addressing the gap left by Mackie and is the author who is the most helpful in answering the question.

Raz initially held a position similar to Smith's that not only is there no obligation to obey the law, there is not even a *prima facie* obligation to obey it.<sup>163</sup> However, Raz made two concessions: (1) some people may have moral reasons for obedience; and (2) most people have good prudential reasons for obedience most of the time.<sup>164</sup> Raz's two concessions imply two conclusions. The first is that some people have individual reasons based on moral or prudential judgment for obeying the law. The second conclusion which follows is that such compliance is voluntary rather than mandatory. Raz subsequently cautioned that his denial (*i.e.*, there is no obligation to obey the law) does not mean that people should disobey the law nor does it imply that it is immaterial whether individuals obey or disobey.<sup>165</sup> In order to make his position more clear, Raz examined the concept of consent as the relationship between individual and the authority which enacts the law. Within the context of contemporary political institutions having a myriad of rules potentially or actually regu-

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159. *Id.* at 61.

160. J. L. Mackie, *Obligations to Obey the Law*, 67 VA. L. REV. 143, 144 (1981).

161. *Id.* at 158.

162. *Id.*

163. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 233 (1979).

164. *Id.* at 237, 242.

165. Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103, 104 (1981).

lating people's lives, Raz's notion of consent is a sensible manner of investigating if obedience is voluntary or otherwise.

First, Raz regarded "consent" as a cognitive agreement which acknowledges a change in the normative situation of a person; second, consent eventually imposes the performance of action which demonstrates the normative change; third, consent has a public element in which the individual who offers the consent holds out to others (usually members of the same political society) the first two conditions.<sup>166</sup> Yet, Raz's notion of consent is not an inviolable rule which always binds people to obey. If the society is just and a person tends to identify with this society, then it is morally permissible for that person "to adopt an attitude of conscientious watchfulness" in which obedience is not performance of an obligation but exercise of a person's moral judgment that this is what ought to be done.<sup>167</sup>

Guiding Raz's investigation of the relationship between individuals and the law is the issue of whether the law is itself morally justified. The question about whether there is any obligation to obey cannot be answered according to Raz until it is established that the law itself is morally grounded. Only then can one like the virtuous lawyer assess the person's moral obligation to obey.<sup>168</sup> It would seem that the stronger the moral justification for a law, the more a moral person is obligated to obey it; in turn, the weaker the moral justification, the less one is obliged to honor it. Because individuals are moral agents who often have different, personal decisions to make, the extent of any obligation to obey will vary from person to person.<sup>169</sup>

Raz takes issue with John Finnis's contentions that (1) the law is a seamless web and (2) individuals cannot pick and choose which laws they will obey and those they will not.<sup>170</sup> Reasons for following or not following the law, according to Raz, tend to be individual, based on the moral justifications of the law and the circumstances (including moral ones) of each individual in relation to each law. Some individuals may also be more concerned about or more affected by some laws and less concerned with or less affected by others. This leads Raz to identify "an attitude of respect" for the law which is founded not on an obligation to obey the rules established and enforced by the authority but on the premises that the law is one's law because it is either (1) the law which one has respect for or consents to through "voluntary or semi-voluntary obligations"<sup>171</sup> or (2) the law of the community to which one belongs and identifies.<sup>172</sup>

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166. *Id.* at 119-20.

167. *Id.* at 130-31.

168. Joseph Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139, 140 (1984).

169. *Id.* at 146.

170. John Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 115, 120 (1984).

171. RAZ, *supra* note 35, at 99.

172. Raz, *supra* note 168, at 154.

Rather than having an obligation to obey, one has a relationship to the community—the source of all law—which grows as one's identification with it grows. This is akin to the "organic relationship" or covenant between a person and his community.<sup>173</sup> What emerges is a quasi-obligation to obey not so much the law as "one's attitude toward the community" to which a person belongs. As Raz states, "[I]f there is a general obligation to obey the law, it exists because it was voluntarily undertaken" as a result of a person joining and remaining with the community.<sup>174</sup> Surely, a person living in a totalitarian state may follow the law because of the harsh consequences of not doing so. But even here, there is a sense of voluntariness when a person's prudent judgment and realization about the practical considerations associated with obedience and disobedience influence his decision.

However, when looking at democratic states and the societies in which they exist, the story is somewhat different in that the voluntary nature of citizen obedience is more characteristic of the political institutions. The stronger the bond with the community (and its law), the stronger the voluntary obligation to be obedient to its rules; the less one identifies one's self with the community, the weaker becomes that voluntary obligation. But what about the virtuous lawyer?

In the context of the virtuous lawyer, it is not simply a *free spirit* which autonomously decides whether to obey a particular law or to obey any law in a particular context. Rather it is the virtuous lawyer as moral reasoner who seeks the good and looks at the law through the lens of virtue. As mentioned in the earlier discussion on whether legal reasoning is moral reasoning, the law consists of those rules simultaneously used by each person along with the community at large to direct how people live in peaceful coexistence with one another. When the law is not used to achieve this goal of ensuring that the members of the society live in right relation with one another, the duty or obligation to obey these rules may be questioned since the law's existence and application are directed toward achieving the good for all is in doubt. The virtuous lawyer first of all understands the meaning of the law through the lenses of teleology, moral reasoning, and the virtues of courage, compassion, wisdom, prudence, and justice. Relying on this calculus, the virtuous lawyer's determination on whether the law is to be obeyed or not is guided by objective moral reasoning, the good for both the community and the individual, and application of the virtues.

## VI. THE VIRTUOUS LAWYER AT WORK: SEVERAL PARADIGMS

At this stage, I should like to take this concept of the virtuous lawyer and give it more concrete definition. In doing so, I rely on the foundation

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173. RAZ, *supra* note 35, at 104.

174. RAZ, *supra* note 168, at 155.

that lawyers (1) should understand the distinction as well as the connection between the right and the good; (2) respect those aspects of the law which depend on moral reasoning; and (3) appreciate the interrelationship between obedience and disobedience to the law. I shall begin to develop the paradigm of the virtuous lawyer from Aquinas's discussion on the virtues of justice and prudence.<sup>175</sup> Aquinas authored a discourse on law as well as an investigation of prudence and justice. Both offer relevant insights on contemporary social and legal issues which have great bearing on the investigation of the virtuous lawyer.

In the *Prima Secundae* of his *Summa Theologiae*, Aquinas presented his general theory of law. He defined law as rules or measures of acts whereby individuals are induced to act or are restrained from acting.<sup>176</sup> His concept of the law helps establish the ground from which the investigation of the virtuous lawyer will develop and take shape. Aquinas acknowledged that law is generally directed toward the common good of mankind.<sup>177</sup> This basic point established a goal or the teleological dimension of the law which, as I have indicated earlier, is important to the virtuous lawyer. Aquinas further identified the several kinds of law as eternal, divine, natural, and human.<sup>178</sup> The eternal law<sup>179</sup> is teleological and concerns God's plan of divine wisdom directing all things to the attainment of their end.<sup>180</sup> The divine law is related to the eternal law in that it directs the last end of people and orders what they ought to do or avoid, judges interior human movements, and punishes those evil deeds which human law cannot or does not punish.<sup>181</sup> Human law is the derivative of practical reason which directs the human race to known or knowable principles applicable to matters of human conduct.<sup>182</sup> But these descriptions and definitions of the law do not give the virtuous lawyer substantive knowledge about the particulars of the law. Rather, they provide the virtuous lawyer with the ability to reflect upon what the law ought to be in a broad way.

Dean Anthony Kronman has acknowledged an important contemporary role for practical reasoning or wisdom which is central to Aquinas's definition of human law. While acknowledging the strong skepticism

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175. Throughout my discussion, it might be useful to keep in mind Alasdair MacIntyre's definition of virtue as "an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods." MACINTYRE, *supra* note 15, at 191. It would also be helpful to consider the advice MacIntyre gives on how the virtues of prudence and justice differ: "Prudence is both an exercise of reason and concerned with how reason should operate in practice. Justice is an application of reason to conduct and is concerned with how the will may be rationally directed toward right conduct." ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 197 (1988).

176. AQUINAS, *supra* note 16, at Ia-IIae, Q. 90, art. 1.

177. *Id.* at Ia-IIae, Q. 90, art. 2, ad 1.

178. *Id.* at Ia-IIae, Q. 91.

179. *Id.* at Ia-IIae, Q. 91, art. 1.

180. F. C. COPLESTON, S.J., *AQUINAS: AN INTRODUCTION TO THE LIFE AND WORK OF THE GREAT MEDIEVAL THINKER* 211 (1955).

181. AQUINAS, *supra* note 16, at Ia-IIae, Q. 91, art. 4.

182. *Id.* at Ia-IIae, Q. 91, art. 3.



against practical wisdom in both legal education and the profession, Dean Kronman asserts that "practicing lawyers still need the intellectual and affective powers whose combination constitutes the virtue of practical wisdom."<sup>183</sup> As he further notes, practical wisdom is a character trait of what he calls the "lawyer-statesman" need to guide the lawyer in difficult deliberations essential to doing the good of serving both the client and society.<sup>184</sup> This notion of doing good emerges elsewhere in the thought of legal and political philosophers who understand the significance of virtue to human life.

In drawing from Aquinas, Etienne Gilson suggested that the first and foremost principle of legal prescriptions which humans know is that they are to do good and avoid evil.<sup>185</sup> Gilson's understanding reflects Aquinas's point that the law provides one vehicle through which human reason can discern what is good and what is evil.<sup>186</sup> The frequently cited passage of the First Principle—that is, do good, avoid evil—makes the point by stating that: "[T]he primary precept of the law is that good should be done and pursued, and evil avoided; and on this are founded all the other precepts of the law and nature."<sup>187</sup>

While this definition and discussion of law does not give the virtuous lawyer much knowledge about the substantive content of the law and how this content can and should be used to address and resolve the disagreements found amongst members of the community it serves, it does give a direction and a general methodology of developing and applying law. As Charles Nemeth has pointed out, the Thomistic understanding and explanation of law as offering a guide in moral matters is "a far more flexible avenue than popularly conceived."<sup>188</sup> Nemeth's careful study of Aquinas's understanding of the meaning of law demonstrates that individuals who turn to the Thomistic notion "looking for recipes, *indicia* of conduct, a lexicon of moral decisions, will be sorely disappointed."<sup>189</sup> Aquinas did not provide answers to hard legal questions. Rather, he constructed a methodology to pursue answers to difficult legal issues. It is this same methodology which guides the virtuous lawyer in facing one's professional responsibilities to both his client and the community at large.

Echoing the discussion of the interdependence of the right and the good addressed earlier in this Article, Nemeth also remarked that Aquinas's legal philosophy is more like a map than a set of specific directives; it helps the virtuous lawyer to get to the general goal of doing good without identifying any particular steps that might seem indispensable to other individuals. As Nemeth stated:

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183. KRONMAN, *supra* note 42, at 269.

184. *Id.* at 41-44.

185. ETIENNE GILSON, *THE PHILOSOPHY OF ST. THOMAS AQUINAS* 327 (1929).

186. AQUINAS, *supra* note 16, at Ia-IIae, Q. 91, art. 2.

187. *Id.* at Ia-IIae, Q. 94, art. 2.

188. Charles P. Nemeth, *A Commentary on the Natural Law, Moral Knowledge and Moral Application*, 34 CATH. LAW. 227, 251 (1993).

189. *Id.*

Thomistic moral reasoning heavily relies on natural law principles, their inherent, indelible imprint on each person, and the content of first principles involving the selection of good conduct and affirmative avoidance of evil. Operating within the framework is the explicit recognition that general tenets of natural law reasoning do not prescribe absolute formula for moral resolution, but instead aid the person with an inclination, a habitus, a *synderesis* tugging to the "good." Virtue, especially prudence, has a commanding function to play.<sup>190</sup>

Thus, Nemeth identified virtues, but especially prudence, as "the forgotten elements" in the implementation of legal theory for today.<sup>191</sup> Nemeth's recognition about the importance of virtue has been further developed and reformulated by Daniel Mark Nelson. Keeping in mind the earlier discussion about legal reasoning being (in large part) moral reasoning, Nelson has done much to explicate the moral significance of Thomistic thought, especially the role of the virtues, for the virtuous lawyer. He recognized that the important issue for contemporary interpretation of Thomistic ethics is in "the significance that [Aquinas] seems to attribute to prudence does not fit well with the standard natural-law reading."<sup>192</sup> While Nelson has argued that there can be tension between the view which sees Thomistic ethics as natural law-based with other perspectives which see them as based on the virtue of prudence as the "means for achieving the good,"<sup>193</sup> the focus of his interpretation "resolves the difficulty by showing how Thomas's understanding of ethics is more thoroughly prudential than generally assumed."<sup>194</sup> His basic point is that both the moral life and reflection upon it "depend on prudence and not on knowledge of the natural law—at least not the versions of natural law commonly attributed to [Aquinas]."<sup>195</sup> Nelson considered that it is essentially prudence rather than natural law which directs human practical reason toward the moral and the good.<sup>196</sup> However, Nelson was not the first to assert the significance of prudence. Almost forty years earlier, Fr. Frederick Copleston presented the suggestion that paved the way for Nelson's thesis when Copleston asserted that it is impossible to have moral virtues without the intellectual virtue of prudence.<sup>197</sup>

The virtuous lawyer can better appreciate the significance of the virtue of prudence by examining the principal texts from the *Summa Theologiae*

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190. *Id.* at 236.

191. *Id.* at 249.

192. DANIEL M. NELSON, THE PRIORITY OF PRUDENCE: VIRTUE AND NATURAL LAW THEORY IN THOMAS AQUINAS AND THE IMPLICATIONS FOR MODERN ETHICS xi (1992).

193. *Id.*

194. *Id.* at xii.

195. *Id.*

196. *Id.* at 27.

197. COPLESTON, *supra* note 180, at 215. Copleston continues by arguing that "it is not possible to have the moral virtues without the intellectual virtue of 'prudence' which inclines us to choose the right means to the attainment of the objective good or to have prudence without the moral virtues." *Id.* For Copleston, then, the moral and intellectual virtues are interconnected.

along with their contemporary commentaries. This examination will illustrate how prudence can be an effective instrument for the virtuous lawyer in finding and doing the good in contemporary public life; moreover, this examination should also demonstrate that prudence has had an important impact on how the virtuous lawyer can attain justice in the American legal culture.<sup>198</sup>

Previously I mentioned that there is a *telos* or goal involved with the method Aquinas developed for living the moral life in which good is sought and evil is avoided. Within the context of the *Summa Theologiae*, the *telos* is identified with justice, the object of which directs "man in his relations with others."<sup>199</sup> At the heart of the interpersonal relationship, and therefore justice, is "a kind of equality" for the name of *justice* implies equality for "things are adjusted [*i.e.*, a person is in right relationship with another person] when they are made equal, for equality is in reference of one thing to some other thing."<sup>200</sup> As social beings, people have a variety of relationships with other persons; for these relations to be right, they must be rectified "in relation to the person they are directed [and] about such dealings there is a special virtue, and this is justice."<sup>201</sup> For Aquinas, justice has another identity which is "truth" and truth is achieved "when the rectitude of the reason which is called truth is imprinted on the will on account of its nighness to the reason."<sup>202</sup> But what is this "rectitude of reason" which is essential for justice? The answer to this question appeared in Aquinas's examination of the virtue of prudence.

If the goal of human existence is to live in right relation with one another in accordance with the First Principle and if this goal is to be attained through the virtue of justice, how do members of the legal profession come to discover what it is that will constitute the good in our

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198. The contextual back drop for this final discussion about justice will be an examination of the legal and moral reasoning employed by the dissenting justices who, relying on several virtues, sought justice in *Dred Scott*, *Plessy*, and *Korematsu*.

199. AQUINAS, *supra* note 16, at IIa-IIae, Q. 57, art. 1.

200. *Id.* A.P. d'Entrèves has concluded that the concept of equality of people is fundamentally related to the theme of natural law. See A.P. D'ENTRÈVES, *NATURAL LAW* 26 (1970). Lloyd Weinreb has made a helpful contribution to the understanding of equality that emerges from natural law systems. He argues that "equality has value as the complement of liberty; it is only in connection with liberty that equality can be understood as a human value at all." LLOYD WEINREB, *NATURAL LAW AND JUSTICE* 161 (1987). I agree with Weinreb that liberty (freedom) must somehow serve as a complement to equality. After all, one can look at a group of slaves and argue that they as members of a community have and share equality. The point is that equality must be tied in with human goods like liberty, opportunity, wealth, and self-respect identified by both John Rawls's "thin theory of the good" and Will Kymlicka. See KYMLICKA, *supra* note 87, at 33. John Finnis identifies life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion as the relevant goods pursued by humans. FINNIS, *supra* note 33, ch. IV. Elsewhere, Weinreb has pointed out that the conflict and tension which arise between equality and liberty reveal that understanding one means that we must understand the other—"[t]heir reconciliation takes us beyond either considered by itself." WEINREB, *supra*, at 183.

201. AQUINAS, *supra* note 16, at IIa-IIae, Q. 58, art. 2, ad 4.

202. *Id.* at IIa-IIae, Q. 58, art. 4, ad 1.

relations with our neighbors? It is through prudence. Aquinas exhorted, "Prudence is a virtue most necessary for human life. For a good life consists in good deeds."<sup>203</sup> It is here where Aquinas makes the connection with justice through the notion of "rectitude of reason." He continued by arguing:

[I]n order to do good deeds, it matters not only what a man does, but also how he does it; to wit, that he do it from right choice and not merely from impulse or passion. And, since choice is about things in reference to the end, rectitude of choice requires two things; namely, the due end, and something suitably ordained to that due end. . . . And to that which is suitably ordained to the due end man needs to be rightly disposed by a habit in his reason, because counsel and choice, which are about things ordained to the end, are acts of reason. Consequently, an intellectual virtue is needed in the reason, to perfect the reason, and make it suitably affected towards things ordained to the end; and this virtue is prudence. Consequently, *prudence is a virtue necessary to lead a good life.*<sup>204</sup>

Aquinas elaborated on the significance of prudence to justice and doing good through his argument that moral virtues cannot exist without intellectual virtues such as prudence. Prudence offers and directs people to "the right reason about things to be done"; it also gives them the understanding needed in the exercise of both practical and speculative matters.<sup>205</sup> Knowing and understanding what is moral, what is "the good" of the First Principle, cannot be accomplished without reliance on the intellectual virtue of prudence.

But prudence is also a cardinal virtue according to Aquinas, and, as such, has an inextricable relation to justice as a second cardinal virtue.<sup>206</sup> Prudence exists in the human act of reasoning, and reasoning is directed in its operation into justice.<sup>207</sup> As a cognitive faculty, prudence gives the virtuous lawyer perception or vision which becomes the foundation of human knowledge. And human knowledge is that faculty which, in turn, makes the virtuous lawyer know through reason what is good so that the individual person and his work will be good.<sup>208</sup>

But exactly what is the good which is sought? Is it the antithesis of evil, or is it something else? In the context of moral virtue, it is human good that is sought.<sup>209</sup> As an end or *telos* of the moral virtues, it "of necessity pre-exists in the reason."<sup>210</sup> Prudence does not appoint the end but serves as the means or direction by which people are guided toward this end of the human good.<sup>211</sup> The relevance of this goal of the human good

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203. *Id.* at Ia-IIae, Q. 57, art. 5.

204. *Id.* (emphasis added).

205. *Id.* at Ia-IIae, Q. 58, art. 4.

206. *Id.* at Ia-IIae, Q. 61, art. 2.

207. *Id.*

208. *Id.* at IIa-IIae, Q. 47, art. 4.

209. *Id.* at IIa-IIae, Q. 47, art. 6.

210. *Id.*

211. *Id.*

is vital to the American legal system and its virtuous practitioner.

If there is some question that the human good is geared toward the individual in isolation rather than the individual in relationship with other people, then Aquinas provided an answer to this question. He formulated a solution that "prudence is right reason applied to action" and this method of right reason follows the path of first, making the inquiry; second, judging what has been discovered through inquiry; and, third, taking action toward that which has been inquired about and judged.<sup>212</sup> Once this process is pursued and right reason is implemented, it becomes evident that the common good is better than the individual good according to right reason.<sup>213</sup> While the common good has the upper hand over the individual good,<sup>214</sup> the two are nonetheless intertwined, for it would seem that the concern for the common good can only become manifest if the sum total of the individual goods are viewed as being equal to one another.<sup>215</sup>

Understanding the issue of how these perspectives of the good are to be achieved and how justice is to be done—within the context of prudence—is a vital component of the daily enterprise of the virtuous lawyer. As James Keenan has demonstrated, the moral virtues are connected by prudence which alone "establishes the virtues as 'moral.'"<sup>216</sup> The virtue of prudence "perfects reason" and is essential to the development of the moral virtues, especially justice which is concerned with the external and interrelational operations of human affairs.<sup>217</sup> From the perspective of the virtuous lawyer, American law is a body of rules and regulations intended to direct human conduct which has a public effect, that is, an impact on individuals who are struggling with their relationships with one another. As a body of rules, the law is in need of interpretation so that lawyers, along with the rest of society, can deal directly with human interrelationships and their regulation as covered by the law. It is precisely the responsibility of the virtuous lawyer to engage in this interpretation to ensure that the goal of justice—of right relationship with the neighbor—is obtained. Legal regulation exists not for the sake of regulation itself, but rather for the sake of peaceful reconciliation of differences and disputes.<sup>218</sup> Aquinas addressed the importance of another virtue—justice—as the means of directing people

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212. *Id.* at IIa-IIae, Q. 47, art. 8.

213. *Id.* at IIa-IIae, Q. 47, art. 10.

214. *Id.* at IIa-IIae, Q. 58, art. 5.

215. *Id.* at IIa-IIae, Q. 57, art. 1.

216. JAMES F. KEENAN, S.J., *GOODNESS AND RIGHTNESS IN THOMAS AQUINAS'S SUMMA THEOLOGIAE* 92 (1992).

217. *Id.* at 100, 104.

218. AQUINAS, *supra* note 16, at IIa-IIae, Q. 58, art. 8 ("[S]ince justice is directed to others, it is not about the entire matter of moral virtue, but only about external actions and things, under a certain special aspect of the object, in so far as one man is related to another through them."); *see also id.* at IIa-IIae, Q. 58, art. 10 ("[T]he matter of justice is external operation, in so far as an operation or the thing used in that operation is duly proportionate to another person, wherefore the mean of justice consists in a certain proportion of equality between the external thing and the external person.").

toward right relationship with one another when he stated that it "is proper to justice, as compared with the other virtues, to direct man in his relations with others. . . ."219

Jean Porter offered the summation that "Aquinas's theory of morality is grounded in a theory of the human good that gives content to the fundamental norms of love of neighbor and nonmaleficence and provides criteria by which to evaluate the goodness both of actions and of states of character."<sup>220</sup> The relevance of the virtues to Aquinas's understanding of the law becomes clear: if the law requires that people do good and avoid evil, then the virtues direct individuals toward that which is good. And if humans have developed a system of law which relies on reason to "proceed to the more particular determinations of certain matters,"<sup>221</sup> the virtue of justice becomes manifested in external human actions directed toward "right relations among individuals, or between the individual and the community."<sup>222</sup>

The Jesuit philosopher Robert Henle made a connection between Thomistic thought and its relevance to present day American legal institutions. As with Porter and Nelson, the connection Henle makes is not based so much on Thomas's treatment of natural law or the treatise on law but on the virtues, especially justice.<sup>223</sup> In particular, Henle identified Questions 57-62 of *Summa Theologiae* I[sic]-II as particularly relevant.<sup>224</sup> By placing Henle's observation in the context of the more recent work completed by both Porter and Nelson, the virtuous lawyer gets to see more clearly the substantive contributions which Thomistic thought can make to the American legal scene of today.

Porter contended that, within the context of Thomistic thought, prudence directs or determines courses of activity and specific actions that implement the virtues in the particular circumstances of everyday human life.<sup>225</sup> It would seem that prudence has an influence on the development of that which is just. In noting that human moral life has a goal or teleological component,<sup>226</sup> Nelson suggested that as individuals moved toward the *telos*, they need to acquire and develop the practical reason or knowl-

219. *Id.* at IIa-IIae, Q. 57, art. 1.

220. JEAN PORTER, *THE RECOVERY OF VIRTUE: THE RELEVANCE OF AQUINAS FOR CHRISTIAN ETHICS* 31-32 (1990).

221. AQUINAS, *supra* note 16, at Ia-IIae, Q. 91, art. 3.

222. PORTER, *supra* note 220, at 124.

223. ROBERT HENLE, S.J., *ST. THOMAS AQUINAS AND AMERICAN LAW*, *THOMISTIC PAPERS* II 78 (1986).

224. *Id.* I believe that there is a typographical error made in Henle's text. *Summa Theologiae* Ia-IIae, Questions 57-62 do not deal with justice but the intellectual and cardinal virtues. While the virtues do play an important role in our understanding Aquinas's contribution to American law, I believe Fr. Henle, when speaking of Thomas's discussion of justice intends to refer to Questions 57-62 which deal directly with the subject of justice.

225. PORTER, *supra* note 220, at 159.

226. NELSON, *supra* note 192, at 32.

edge necessary, and "this is precisely the concern of prudence."<sup>227</sup>

In acting morally and in accordance with the law which can help people live their lives in better relationship with others, they must first identify courses of action to take. Second, they have to make selections about which specific actions they pursue and which ones they will not. Prudence is essential to deliberating and choosing well. As Nelson argued, "Willing the right good and choosing the right means both require prudence."<sup>228</sup> There should be no doubt that prudence is essential to making the right choices about how we direct our activities that relate to our community lives. As Nelson stipulated:

Prudence is a necessary virtue for practical reasoning because it enables one to do good deeds, the activity in which a good life consists, and to become a good and happy person. For a deed to be truly good, Thomas explains, it has to be done in the right way and for the right reasons. Harming a man out of anger, for example, would be opposed to justice as well as to prudence, while harming a man to prevent him from maliciously injuring an innocent victim could well be a prudential act of virtue. Prudence enables us to act in the right way, for the right reasons, and at the right time. It seeks to discern what is to be done now or in the future on the basis of knowledge of the present situation and past experience. Prudence gives one a sense of moral perspective.<sup>229</sup>

This is not to say that Aquinas's understanding of natural law and the First Principle are immaterial or extraneous to his understanding of how one seeks and lives the well-directed good life in relation with others. Natural law and the First Principle are important for setting the stage of life.<sup>230</sup> But the real question for Aquinas is, once the stage is set, how do individuals perform, that is, how do they know what it is they should do and how do they accomplish these tasks? The virtue of prudence is instrumental in letting each person focus one's vision so that each knows what to do in response to God's law that participates in our world through the natural law. Prudence is crucial to each human making the decision guided by the exercise of practical reason. While legal theories

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227. *Id.* at 39. Nelson also states that prudence focuses on "the knowledge of particulars which are the matter of action" and that it is the "right reason" that is instrumental in directing our action and choices about the right end. *Id.* at 102-03.

228. *Id.* at 50.

229. *Id.* at 81. Nelson states:

Through the moral virtues we intend good ends, and through prudent deliberation, judgment, and command of action we are able to attain them. As we have already seen, the distinction between ends and means is far from absolute . . . . Prudence, strictly speaking, is concerned with the means toward ends to which we are oriented by the moral virtues. The moral virtues, however, depend for their direction on the ordering and control of prudence.

*Id.* at 84.

230. *Id.* at 96. As Nelson explains his point, "[N]atural law serves an explanatory function rather than the function of providing specific moral information. It explains how we come to reason practically without telling us how to reason, and it explains why we are able to act virtuously without guiding our actions." *Id.* at 100. For Nelson, natural law is the efficient cause: it moves, or better, it serves as the catalyst for activating practical reason. *Id.* at 105.

that extend from natural law provide the most basic guidance through the First Principle, it is the virtue of prudence which directs members of the legal culture, especially the virtuous lawyer, to specify what action they must take in the particular circumstances of daily conflict and life to do that which is good and avoid that which is evil.<sup>231</sup> As Nelson suggests, "In order to determine the rightness or wrongness of acts, according to Thomas [*i.e.*, whether they constitute doing good or evil], we have to determine whether or not they are reasonable and virtuous."<sup>232</sup>

If these virtues (*i.e.*, prudence, justice, wisdom, and courage) develop a model of the virtuous lawyer, have they been revealed in any concrete legal contexts? The dissenting voices of Justices Curtis and Mclean in *Dred Scott*, Justice Harlan in *Plessy*, and Justices Murphy, Jackson, and Roberts in *Korematsu* as models of virtuous lawyers illustrate my point that Aquinas's understandings of law and virtue have both meaning and application to the American legal profession of today.

These jurists relied on virtues to deal with three of the most difficult cases yet raised in American law. I suggest here that the virtuous lawyer could, in some cases, reach the same decision as other lawyers; however, the virtuous lawyer might also consider the case differently. While results of decisions are important, they are not everything in the legal process. It is my view that the virtuous lawyer strives to be a more discerning individual—to be an "exemplar" of the virtuous lawyer by assessing what the case is, where it should go, and how does the virtuous lawyer contribute to attaining the just end.<sup>233</sup> If the goal of justice is the just end as I have suggested, how do lawyers get there? My approach to addressing this

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231. As Nelson points out:

Because the power of reasoning practically is part of our nature, and because we therefore participate in a special way in God's reason or eternal law, every action, power, and passion under the control of reason *especially* belongs to the natural law. . . . Nature provides only the most general sort of guidance in the sense that natural inclinations provide the very wide boundaries within which prudential reason operates. . . . [P]ractical reason under the direction of prudence is concerned with obtaining physical, social, intellectual, and spiritual goods. We do not naturally know, however, how any of those goods are rightly (which is to say reasonably and virtuously) to be obtained, except in the sense that it is natural for rational creatures to reason about such matters. We do not have natural knowledge of the moral species of acts. The moral specification of acts is a prudential judgment of practical reason.

*Id.* at 121-22 (emphasis in original).

232. *Id.* at 127.

233. See also George Kannar, *Strenuous Virtues, Virtuous Lives: The Social Vision of Antonin Scalia*, 12 CARDOZO L. REV. 1845, 1867 (1991) (suggesting that the direction in which the virtuous judge proceeds can vary from transcending the social and political contexts of the day to immersing one's self in them). Kannar indicates:

[T]he type of "virtue" that ultimately distinguishes the extraordinary player from the ordinary highly skilled professional is not this technical legal "talent," . . . . The vision that makes the difference, then, is of the type we call "peripheral": a sense not just of what you personally believe or value, or of how to execute the standard moves, but a deeper, more intuitive and more complex "sense of where you are."

*Id.*



question may be more anecdotal than scientific, but it is one way of achieving the goal which underlies the duties of being a lawyer. The cases of *Dred Scott*, *Plessy*, and *Korematsu* supply several factual contexts in which present-day members of the legal profession can reflect on how the virtuous lawyer might approach assessing who we are, where do we want to go, and how do we get there.

*Dred Scott* raised the issue of the status of an African-American slave who had been taken into a territory where slavery was illegal. While not necessarily reflecting his own personal views, Chief Justice Taney, in writing for the majority, noted the popular sentiment that black people have "been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relation[s]." <sup>234</sup> Being the careful jurist that he was, <sup>235</sup> Taney investigated these views in the context of the foundational documents of the republic, that is, the Declaration of Independence and the United States Constitution. In his desperate effort to justify the Court's decision both legally and morally, he turned to the language of the Declaration which states that "all men are created equal; that they are endowed by their Creator with certain unalienable rights; [and] . . . that to secure these rights, Governments are instituted . . ." <sup>236</sup> While Taney was not alone in asserting this view, he hastened to add that this generally embracing and protective language was not intended to apply to the African race presumably because this class "formed no part of the people who framed and adopted" the Declaration. <sup>237</sup> Regrettably, the Chief Justice presumed not only what the drafters intended but what the language must mean in the minds of the readers of this text as well when he insisted, without corroboration of any kind, that no one in "the civilized world" would suppose that these protections would extend to the "negro race." <sup>238</sup> Curiously, his presumption that the "unhappy black race were separated from the white by indelible marks . . . and were never thought of or spoken of *except as property*," <sup>239</sup> took no account of other, more ancient authority in the Bible telling Christian and Jew alike that the black race had been earlier thought of in quite another regard. <sup>240</sup>

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234. *Dred Scot*, 60 U.S. at 407. Chief Justice Taney continued with traditional views of blacks as articles of merchandise who could be "justly and lawfully be reduced to slavery for his benefit." *Id.*

235. See generally Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Judges*, 31 TULSA L.J. 93, 102-08 (1995).

236. *Dred Scot*, 60 U.S. at 410.

237. *Id.*

238. *Id.*

239. *Id.* (emphasis added).

240. In 2 *Chronicles* 14:9-13, we are told about the conflict between Asa's army and that of the Ethiopian Zerah who had "an army of a million men and three hundred chariots. . . ." Isaiah's prophecy tells of King Hezekiah being warned that King Tirhakah of Ethiopia (sometimes called Nubia) "has set out to fight against you." *Isaiah* 37:9. Jeremiah's prophecy informs about the Ethiopian (or Nubian) Ebed-melech, a servant but also a man of influence in King Zedekiah's household, who persuaded the king that evil doers had cast Jeremiah into a muddy cistern and that the king should have the prophet rescued. To this request, the king agreed and, because of Ebed-melech, Jeremiah was res-

In the Constitution, Taney had firmer texts with which to work. He pointed to two clauses which justified for him the conclusion that blacks "were not regarded as a portion of the people or citizens of the Government. . . ." <sup>241</sup> The first clause upon which he relied is taken from Article I, section 9, clause 1 and reserved to each state the right to import slaves until 1808. <sup>242</sup> The second clause is found in Article IV, section 2, clause 3 and enabled a slave owner of one state to reclaim his "property" who may have escaped into another state's territory. <sup>243</sup> In Taney's mind, these two clauses were sufficient to deny black people "or their posterity" the "blessings of liberty, or any of the personal rights so carefully provided for the citizen." <sup>244</sup> Curiously, the Chief Justice made no reference to Article I, section 2, clause 3 which considered each black to be three-fifths of a person for the purpose of assessing representatives to the House of Representatives. In this regard, the black received greater status than the Native American whose presence in any Congressional district was immaterial, that is, the American Indian was not a person or any percentage thereof for assigning Congressional representation. <sup>245</sup> Ultimately, Taney concluded that because of these texts as well as the general history of race relations in the United States, not even Congress could enact legislation making "free" slaves who were taken by their owners into nonslave territory. <sup>246</sup>

All of the other justices of the Court wrote their own opinions. With the exception of the two dissenters, Justices McLean and Curtis, the other members of the Court generally agreed with the Chief Justice concerning the status of the black race in the American legal and political culture of the day. It is important to remember that these were not evil men; rather, they considered themselves as they were considered by others to be good, law abiding citizens and public servants. Noting that the case involved "private rights of value" as well as "constitutional principles of the highest importance," <sup>247</sup> Justice Wayne regretted that the Court could not be unanimous in supporting Taney's opinion. <sup>248</sup> The source of the regret was not that McLean and Curtis were from the outset different people with very different world views. Rather it might be that the dissenters approached the case and the issues it presented in a different light that was guided by forces including certain virtues.

I suggest here that my model of the virtuous lawyer would recognize how vital the absence of evidence of discrimination is to adjudicating a

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cued from certain death. *Jeremiah* 38:7-13. Again, in the New Testament, in *Acts* 8:26-40, we hear of the Ethiopian eunuch who was the treasurer of the queen of the Ethiopians and was baptized by Philip.

241. *Dred Scott*, 60 U.S. at 411.

242. *Id.*

243. *Id.*

244. *Id.*

245. U.S. CONST. art. I, § 2, cl. 3.

246. *Dred Scot*, 60 U.S. at 452.

247. *Id.* at 454 (Wayne, J., concurring).

248. *Id.* at 455.

case like *Dred Scott*. The dissenters—two examples of the virtuous lawyer—demonstrated elements essential to this model when they realized and publicly acknowledged that the Chief Justice and the rest of the Court were wrong. Justices McLean and Curtis raised questions and offered answers which escaped the consideration of the members of the majority. In particular, it was the appropriation and exercise of the virtues of wisdom, courage, prudence, and justice which enabled the two dissenters to understand the case more broadly and deeply and to offer the better, more equitable solution. At the outset of his dissent, Justice McLean challenged Taney's view that the law had long acknowledged the inferior position of the members of the black race. He pointed out that the different and inferior treatment extended to the black was "more a matter of taste than of law."<sup>249</sup> In fact, the legal tradition would tend to support the dissenters' view more than the position of Chief Justice Taney and the majority. For example, under both European civil and English common law, the removal of a slave from slave territory to nonslave territory led to emancipation.<sup>250</sup> Moreover, under his compilation of the English common law of 1765 to 1769, William Blackstone noted that the "spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo instanti* a freeman."<sup>251</sup>

Certainly, then, the notion that the negro slave was anything less than another fellow human being deserving of the same entitlements of citizenship did not comport with the law of other civilized nations prior to and at the time *Dred Scott* was decided. But Chief Justice Taney still constructed his justification that the negro was not entitled to the same rights and privileges as citizens because they were not deemed citizens by the framers of the Declaration and the Constitution.<sup>252</sup> Yet Madison, as a principal drafter of the Constitution and co-author of *The Federalist Papers*, suggested otherwise in a way that supports the dissenters and counters the majority.

The first insight offered by Madison concerning the wrongness of slavery is in his contrast and comparison between the Confederation and the Constitution. Importation of slaves would have been a permanent feature under the Confederation, but under the Constitution, it would be permitted for only twenty years.<sup>253</sup> Admittedly, this particular text of Madison was silent on the propriety or impropriety of slavery beyond this period of twenty years; the only clear point was the recognition that the

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249. *Id.* at 533 (McLean, J., dissenting).

250. *Id.* at 534.

251. 1 WILLIAM BLACKSTONE, COMMENTARIES \*123. Blackstone later commented that since the principles of English law give no countenance to slavery, "the slave is entitled to the same liberty in England before, as after, baptism; and, whatever service the heathen negro owed to his English master, the same is he bound to render when a chieftain." *Id.* at \*413.

252. *Dred Scott*, 60 U.S. at 410-12.

253. THE FEDERALIST NO. 38, at 109 (James Madison) (William Brock ed., 1992).

importation of slaves beyond the year 1808 would no longer be tolerated. However, in several subsequent papers, Madison questioned the longevity of the institution itself.

In *The Federalist No. 42*, Madison, unlike Taney, mentioned not only the cessation of slave importation after 1808, but the stiff fine [for the time] as well.<sup>254</sup> But Madison was not satisfied with so indirect a criticism of slavery and its maintenance as an American institution. He continued by arguing that it would have been preferable to not postpone the banning of importation until 1808 but to outlaw continuation of this "barbarism of modern policy" immediately.<sup>255</sup> The most extensive discussion of slavery and the status of the negro offered by Madison appears in *The Federalist No. 54* which addressed the matter of apportioning seats to the House of Representatives.

Here, we see Madison's critical acknowledgment that the Constitution was a document of compromise rather than one of complete principle.<sup>256</sup> Madison began his critique by suggesting that opponents to the Constitution understood slaves to be property rather than fellow human beings; however, the Madisonian Publius quickened the chase by offering an opposing view.<sup>257</sup> He disabused the reader that a slave is merely property rather than a person.<sup>258</sup> Madison argued that while the slave may "appear to be degraded from the human rank . . . and classed with those irrational animals which fall under the legal domination of property,"<sup>259</sup> he recognized that the negro is a member of society who is both rational creation and moral person.<sup>260</sup>

No doubt these thoughts had a strong impact on Justice McLean who acknowledged that "James Madison, that great and good man, a leading member of the Federal convention, was solicitous to guard the language of [the Constitution] so as *not* to convey the idea that there could be property in man."<sup>261</sup> Justice McLean was a practical man who understood well the times in which he lived, yet the execution of his office in this case was guided by the virtue of practical wisdom and prudence. While noting that the federal republic was not created especially for the black, it was nonetheless created to include him because, at the time of the Constitution's adoption, there were states in which blacks did enjoy the rights and privileges of citizenship.<sup>262</sup> Justice Curtis's research revealed that at the time the Articles of Confederation were ratified, all free "native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended

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254. THE FEDERALIST NO. 42, at 181 (James Madison) (William Brock ed., 1992).

255. *Id.* at 182.

256. THE FEDERALIST NO. 54, at 278 (James Madison) (William Brock ed., 1992).

257. *Id.* at 279.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Dred Scot*, 60 U.S. at 537 (emphasis added) (McLean, J., dissenting).

262. *Id.*

from African slaves, . . . were not only citizens of those States," but also enjoyed "the franchise of electors" and were "on equal terms with other citizens."<sup>263</sup> This attitude of five of the states is vital to understanding exactly who were the "people" who formed "the more perfect union" of the Constitution. Chief Justice Taney's analysis of the two clauses examined earlier<sup>264</sup> suggested that the negro race was "not regarded as a portion of people or the citizens of the Government" formed under the Constitution.<sup>265</sup> In applying wisdom, prudence, courage, and justice, McLean convincingly argued to the contrary that "as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established."<sup>266</sup>

In order to dispel the myth that the black race was inferior to the white race as suggested in the social history referred to by Chief Justice Taney, Justice McLean wisely, prudently, and justly reminded his fellow Americans that the white man had also been enslaved at different times in different communities. He stated that "white men were made slaves. All slavery has its origin in power, and is *against right*."<sup>267</sup> One important justification for this view held and offered by Justice McLean was that he took seriously the language of the Declaration quoted by the Chief Justice that "all men are created equal . . . [and] endowed by their Creator with certain unalienable rights."<sup>268</sup> Or, as Justice McLean himself said, "A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."<sup>269</sup>

One would think that forty years later after a civil war was fought and the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution, the question of equality of the races would have been addressed and answered once and for all. However, the case of *Plessy* raised again the existence of practices and beliefs which accorded inferior status to individuals who were either black or shared some black ancestry.<sup>270</sup> While we are never told what his first name is (although we are informed that the Ferguson in the case was the Hon. John H. Ferguson, a

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263. *Id.* at 572-73 (Curtis, J., dissenting). Justice Curtis resigned from the Supreme Court shortly after *Dred Scott* was decided. Although he gave financial considerations as justification for his resignation, it has been pointed out that his dissatisfaction with the outcome of *Dred Scott* was an important factor as well. See Emily F. Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333, 356 (1993).

264. See *supra* text accompanying notes 241-46.

265. *Dred Scott*, 60 U.S. at 411.

266. *Id.* at 582 (Curtis, J., dissenting).

267. *Id.* at 538. (emphasis added) (Curtis, J., dissenting).

268. *Id.* at 410.

269. *Id.* at 550 (McLean, J., dissenting). Justice McLean's view reflects the thoughts of St. Paul in his letter to the Roman Christian community where he states: "Esteem others more highly than yourself. . . . Do not be proud, but be ready to mix with humble people. Do not keep thinking how wise you are." *Romans* 12:10, 16.

270. *Plessy*, 163 U.S. at 537.

Louisiana state judge assigned to the criminal district court), we know that Mr. Plessy had a mixed racial ancestry: he was seven-eighths white and one-eighth black.<sup>271</sup> We also know that he was a citizen and "entitled to every recognition, right, privilege, and immunity secured to . . . the white race."<sup>272</sup> On June 7, 1892, Mr. Plessy boarded a train whose operators were obliged to carry both white and black passengers, but, in accordance with a state statute, railways were required to "provide equal but separate accommodations for the white, and colored races. . . ."<sup>273</sup> Mr. Plessy violated this statute when he purchased a first class ticket and sat in a coach reserved for white passengers.<sup>274</sup> Any passenger who violated this provision by sitting in a coach or area designated for the race not his own was liable to criminal prosecution and subject to either a fine or prison sentence if convicted.<sup>275</sup> As a consequence of his action, Mr. Plessy was charged with and convicted for violating the statute.<sup>276</sup> He subsequently challenged the state laws on the grounds that they violated the Thirteenth Amendment which abolished slavery and the Fourteenth Amendment which prohibited race-restrictive state legislation.<sup>277</sup> In his decision for the majority affirming the judgment convicting Mr. Plessy, Justice Brown found that Mr. Plessy's position was premised on the fallacy that "enforced separation of the two races stamps the colored race with a badge of inferiority."<sup>278</sup> Justice Brown bridled at the notion that equal rights could only be achieved with the "commingling of the two races."<sup>279</sup> He rejected this proposition by declaring that "[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."<sup>280</sup> But the wise and discerning person might ask how could other individuals discover these "natural affinities" or develop "mutual appreciation" if they were legally forbidden to be with one another?

Curiously, Justice Brown concluded the majority opinion with the musing that if Mr. Plessy were considered white (as indeed he might be under some state laws where the percentage of white to black ancestry was crucial in determining this question) that would have dramatically changed the complexion of the case and very possibly its outcome.<sup>281</sup> There were no separate concurring opinions, and there was one dissenting opinion

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271. *Id.* at 538.

272. *Id.*

273. *Id.* at 540.

274. *Id.* at 538.

275. *Id.* at 541. Excepted from coverage under this act were "nurses attending children of the other race." *Id.*

276. *Id.* at 539.

277. *Id.* at 542.

278. *Id.* at 551.

279. *Id.*

280. *Id.*

281. *Id.* at 552.

authored by the first Justice Harlan.<sup>282</sup>

Harlan has been described as "the quintessential voice crying in the wilderness" because he publicly rejected the separate-but-equal justification of the Louisiana law.<sup>283</sup> In seeking justice for Mr. Plessy, John Marshall Harlan exercised wisdom and courage:

[He] transcended, without slighting, mechanical legal analysis; he sought to announce fundamental constitutional truths as well. He spoke not only to his peers, but to his society, and, more important, across time to later generations. He was, in this sense, a secular prophet, and we continue, long after *Plessy* . . . to benefit from his wisdom and courage.<sup>284</sup>

It took wisdom to see and courage to challenge Justice Brown and the majority with these words: "The destinies of the two races . . . are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."<sup>285</sup> Harlan could step back from the case and observe that "the arbitrary separation of citizens" along racial lines generates an unconstitutional "badge of servitude" that cannot be reconciled with any source of lawful authority.<sup>286</sup> By allowing these virtues to guide his investigation, Justice Harlan identified that the majority's rationale to uphold the state action in *Plessy* would lead to injustice of a subtle variety. Noting that slavery as a lawful institution was now a thing of the past, Harlan could courageously prophesy that this "sinister legislation" would dangerously interfere with the goal of enabling citizens, regardless of their race, to obtain "the blessings of freedom" guaranteed to all.<sup>287</sup>

Almost another half century was to pass, thereby allowing the opinions of the *Dred Scott* and *Plessy* dissenters to have their effect on other lawyers. But the winds of war were to bring again to the nation's highest court questions regarding official conduct denying to some what was expected by others. The time was the Second World War and the petitioner was Mr. Fred Korematsu, an American citizen of Japanese ancestry who remained in a particular area of California contrary to the mandates of the Civilian Exclusion Order No. 34 issued by a U.S. Army general. General DeWitt's order required that all persons of Japanese ancestry were to be removed from specified areas of the west coast of the United States as long as hostilities with the Japanese Empire continued.<sup>288</sup> While noting

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282. *Id.* at 552 (Harlan, J., dissenting). Justice Brewer took no part in the deliberation or deciding of this case.

283. William J. Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431-32 (1986).

284. *Id.* at 432.

285. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

286. *Id.* at 562.

287. *Id.* at 563.

288. *Korematsu*, 323 U.S. at 216. Unlike the court in *Plessy*, see *supra* text accompanying note 271, the *Korematsu* Court was able to dignify the petitioner by acknowledging that he had a first as well as last name, acknowledging that he was not simply the petitioner, Korematsu, but was also a human being, like others, entitled to the dignity which a body of names gives to each person and his individuality.

that Mr. Korematsu's loyalty to the United States was never in question,<sup>289</sup> and while taking account of the belief that "[n]othing short . . . of the gravest imminent danger to the public safety" could constitutionally justify the conduct pursued by the military authorities against American citizens,<sup>290</sup> the majority opinion authored by the great civil libertarian Hugo Black concluded that not even "the calm perspective of hindsight" could say that the actions taken by the federal authorities against Japanese-American citizens who were physically removed from their homes and interned in prison camps were not justified.<sup>291</sup> But once again, several lawyers whose actions were influenced by wisdom, courage, and prudence took steps to voice their concern that a great injustice had been accomplished under the guise of the Constitution. These lawyers were Justices Roberts, Murphy, and Jackson.

It was wisdom which led Justice Roberts to see that thousands of loyal Americans who happened to be of Japanese ancestry were being forced into "concentration camps" (as the Jews and other non-Aryans were in German camps around the same time) without any evidence whatsoever of conduct or belief which would place into question their loyalty to their country.<sup>292</sup> Unlike their counterparts in the Nazi camps, Fred Korematsu and his fellow citizens may not have been literally deprived of life, but they were—as were the inmates of the European camps spawned by the Nazi hate machine—denied their property and their liberty by General DeWitt's orders. Sharing the wisdom of his colleague, Justice Roberts, Justice Murphy also had the courage to identify this action taken by the federal government for what it was—an "ugly abyss of racism."<sup>293</sup>

Knowing what it was that both he and the people of the United States were dealing with, Justice Murphy offered prudent counsel which was just as helpful in 1944 as it is over fifty years later to detect and avoid the abyss of racism in our Federal republic. His focus was on how a nation can "deal intelligently with matters so vital to the physical security of the nation."<sup>294</sup> These words were used to caution the critics of the military authorities who were waging war against totalitarian and racist regimes. But they are equally applicable to the people who were waging a just war and serve as a warning that they not become like those against whom they have been forced to take arms. For the defenders must also "deal intelligently" with the method used to protect all of those whom they serve. Justice Murphy's practical wisdom provided him with the clarity of vision enabling him to acknowledge publicly that there were a few Japanese Americans who were disloyal to the United States because they did take action which aided and abetted Imperial Japan.<sup>295</sup> Murphy's coura-

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289. *Korematsu*, 323 U.S. at 216, 219.

290. *Id.* at 218.

291. *Id.* at 224.

292. *Id.* at 226 (Roberts, J., dissenting).

293. *Id.* at 233 (Murphy, J., dissenting).

294. *Id.* at 234.

295. *Id.* at 240.



geous public exercise of wisdom revealed to his fellow citizens the danger of making the unjustifiable conclusion that if a few Japanese-Americans were disloyal, then they must all be suspect. As he pointed out, what became of that important principle of Anglo-American legal logic and common sense that only "individual guilt is the sole basis for the deprivation of rights . . . ." <sup>296</sup> The exercise of prudence as well as the display of his wise discernment raised the question unanswered by the military authorities: why were individual Japanese-Americans not accorded the same privilege of individual investigations and hearings as was accorded to American citizens of German and Italian ancestry who might be suspected of assisting the causes of the Third Reich or Fascist Italy? <sup>297</sup> For Justice Murphy, the goal was a democratic way of life for all Americans regardless of their race, ancestry, or any other nonmerit consideration. <sup>298</sup> In the exercise of prudence, this goal could not be achieved by engaging in the blindly discriminatory action pursued by the west coast American military authority.

It is vital to stress here that the lawyer who adopts virtue in the exercise of his or her duty would concentrate more on ascertaining whether or not the actions taken by citizen and government in *Dred Scott*, *Plessy*, and *Korematsu* were warranted. What would impress the virtuous lawyer in these cases is the realization that the best answers to the difficult problems faced in each of these cases all dealing with a form of discrimination (one issue which remains at the heart of difficult cases to this day) might better be achieved through the exercise not of rules mechanically applied but through a search for just results based on the use of rules that rely on the application of wisdom, courage, and prudence.

Should the virtuous lawyer (or judge) have been more concerned with facts crucial about the specific practices of discrimination in each of these cases? Should the virtuous lawyer have been more understanding of the broad underlying social issues also contained in these cases, such as preserving a union of states or winning a global war? What, in essence, would a virtuous lawyer have done differently than was done in these cases?

I begin addressing these questions with the three general issues upon which a virtue system focuses. I restate these issues so they conform to the particulars of virtue about which a lawyer would be concerned: (1) what kind of people are the parties and the lawyers in this case and what do their interests mean for them and the rest of society; (2) what is it that the parties and lawyers desire and how do these wishes for legal relief relate to the interests of both the parties and the community at large which will be affected by the legal precedent established by the court's decision; and (3) what does the virtuous lawyer consider in order to help reach a just or, better yet, the most just decision? The lawyer's reliance

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296. *Id.*

297. *Id.* at 241.

298. *Id.* at 242.

on and practice of the virtues of justice, prudence, temperance (or restraint), compassion, and wisdom will help this lawyer address these three basic issues.

The lawyer recognizes that the role of the legal process in any case is to contribute to a decision that resolves the conflict based on the law as it applies to each case. The lawyer's role and responsibilities call for a synthesis of fact-finding, interpretation of judicial precedent and applicable statutes, and the application of these interpretations to each case. In situations paralleling those in these three cases, the virtuous lawyer acknowledges that legal authority contains a broad purpose of ensuring protection of society and the institutions which cement it together as well as the interests of the individuals who make up the society. In the implementation of these broad goals, lawyers play prominent roles.

In discrimination cases, the just end toward which the virtuous lawyer is inclined, then, begins with determining whether or not a person was prejudicially treated contrary to the law. The lawyer's reflection and conduct to help resolve the case are molded by the mission of reaching this end. The virtue of justice, in short, aids the lawyer in recognizing that the implementation of the legal process entails working toward this goal of the just result. The result is shaped by correct implementation of the public policy designed to protect people from improper discrimination because they happen to be of some particular ancestry. Inherent in this goal is the understanding that individuals should be treated fairly without consideration given to nonmerit considerations. As Justice McLean reminds us, we all bear the impress of our Maker, and we are all destined to the same endless existence.<sup>299</sup> While there could well be cases in which some human distinctions may be valid criteria for making important public policy decisions, there is no justification warranting the use of such criteria in cases where the exercise of wisdom, prudence, and justice strongly counsel otherwise.

But how does the virtuous lawyer attain this goal that is determined by the virtue of justice. If justice is the goal, the virtue of prudence can be relied upon to reach that goal by providing the means to act justly.<sup>300</sup> One of the questions associated with a legal profession based on virtue is how do we get to the result or goal we seek? The answer to this question requires patient attentiveness that is essential to examine the facts of the case and to hear out the concerns of the parties involved. The prudent lawyer strives to understand fully the multiplicity of concerns at stake in each case. By the same token, the prudent lawyer is also equally attentive to the position and concerns of the state to determine if its action can be justified. In the cases examined in this Article, the virtuous lawyers determined if there were some overarching justification why those individuals like Dred Scott, Plessy, and Korematsu (and those individuals who were similarly situated) should be subjected to discriminatory con-

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299. *Dred Scott*, 60 U.S. at 550 (McLean, J., dissenting).

300. See *supra* text accompany notes 223-29.

duct from which their fellow Americans were immune. Prudence directed their work and led them to the conclusion that the discrimination in these cases could not be justified.

Prudence relies on the ability to distinguish between different sets of values that can promote or defeat the attainment of the just end. Recently, Judge Leon Higginbotham, Chief Judge Emeritus of the U.S. Court of Appeals for the Third Circuit, reminded the legal profession that it was not bad lawyers who allowed the "separate but equal" rule of *Plessy v. Ferguson*<sup>301</sup> but rather "the wrong values" which "poisoned this society for decades."<sup>302</sup> Prudence guides the action for investigating the reality of what are the values that determine the policies of the institution. The prudent lawyer's search can reveal that some actions taken by the state which seem discriminatory may be warranted. Yet, the prudent lawyer must be vigilant in one's concern about the harms as well as the good that emerges from government action. A comprehensive understanding of these goods and harms and how they relate to one another are vital to the prudent lawyer in either going along with or combating the government's action.

Allied with the virtue of prudence is the virtue of wisdom. The virtuous lawyer strives to enlighten one's self. The virtue of wisdom is the force motivating the inquiry that leads to the probing insight needed to comprehend and appreciate the subtleties of each case. In cases like *Dred Scott*, *Plessy*, and *Korematsu*, the virtue of wisdom fortifies the lawyer with the sagacity to understand the goal of effectively addressing discrimination. Wisdom helps the lawyer discern whether or not individuals have been unjustifiably discriminated against. Wisdom also clarifies the vital distinction between the good and the evil which may be fostered by acts that discriminate between citizens. Reinhold Niebuhr once mentioned that "[t]he most perfect justice cannot be established if the moral imagination of the individual does not seek to comprehend the needs and interests of his fellows."<sup>303</sup> Wisdom activates the moral imagination which can better see what facts constitute the "most perfect justice."

Like most individuals in public life, lawyers are open to criticism for the actions they pursue and the decisions they make. History shows that the lawyers who take the right but unpopular stand can suffer.<sup>304</sup> Verbal castigation as well as physical threat can be directed—as happened to Atticus Finch—toward lawyers. The virtue of courage helps steel the lawyer against unwarranted criticism and perhaps even against bodily threat by reinforcing the practice of the other virtues and by helping the lawyer meet harm or danger as one works toward the just end and the

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301. See *supra* text accompanying notes 268-79.

302. A. Leon Higginbotham, *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1010 (1992).

303. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* 257-58 (1960).

304. See INGO MÜLLER, *HITLER'S JUSTICE* 196 (Deborah L. Schneider trans., 1991), where the author argues that there were very few principled judges in the Third Reich who were willing to take a stand against the injustices of the Nazi regime.

resolution of conflict among the parties. Courage is the virtue which also sustains the lawyer in weathering the storm and surviving unjust and improper criticism. Courage reinforces the lawyer's will to do justice. Specifically, in these cases, courage reinforced the virtuous lawyers to deflect the criticism of those who displayed animosity or indifference to the notion of equality and nondiscrimination.

My list of qualities for the virtuous lawyer may not be comprehensive, but it does give the members of the legal profession some further understanding and greater insight on valid and valuable qualities from which the guarantors of fairness and justice in the United States can profit.

## VII. SOME FINAL THOUGHTS

A brief return to the thoughts of Robert Henle helps reformulate the inquiry into virtue's relevance to the contemporary American legal scene. Henle suggested that the Thomistic notion of justice has been appropriated by some American lawyers in their examination and discussion of two sets of questions: the first involves rules of procedure which guarantee fairness; the second concerns rights of the individual.<sup>305</sup> Fairness and the rights of the individual are themes which are familiar to lawyers. But, notwithstanding this general familiarization, the task here is to understand what relation virtues have to the law and justice in the context of American legal institutions.

The virtuous lawyer has a special task in working with the laws and legal institutions designed to protect the individual as well as the community from the evils which human beings direct toward one another. The work of the virtuous lawyer is especially relevant to safeguarding against such evils and to ensuring that the good prevails.<sup>306</sup> Several years ago Chief Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia suggested that a lawyer has the duty not only to serve one's clients but also to serve the public good.<sup>307</sup> Judge Edwards further concluded that these two duties are not mutually exclusive.<sup>308</sup> Borrowing from Judge Edwards, I suggest that a lawyer also serves two constituencies. He has some duty to see that justice is brought to both parties as well as to society at large. As Judge Edwards indicates, these two respon-

305. HENLE, *supra* note 223, at 71.

306. See JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 103 (John J. Fitzgerald trans., 1966). Maritain states:

[T]he principal value of the common work of society is the freedom of expansion of the person together with all the guarantees which this freedom implies and the diffusion of good that flows from it. In short, the political common good is a common good of human persons. And thus it turns out that, in subordinating oneself to this common work, by the grace of justice and amity, each one of us is still subordinated to the good of persons, to the accomplishment of the personal life of *others* and, at the same time, to the interior dignity of one's own person.

*Id.*

307. Harry Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1149 (1990).

308. *Id.*

sibilities are not mutually exclusive. In helping resolve the conflict for specific parties, a lawyer also contributes to establishing a precedent or makes an interpretation that often has an important effect on future cases and on the contemporaneous legal culture consisting of other lawyers who consider the virtuous lawyer's work and apply it to their own.

In this day when difficult issues confront the legal process, lawyers are faced with the challenging task of helping create decisions that resolve conflicts. The challenge becomes all the greater when lawyers realize that resolution of so many of these controversies are not clear cut because no one party has a monopoly on being right or being wrong—but they should share the common goal of avoiding evil.

By assessing what sort of lawyer the profession needs today, consideration of and appropriation from virtues help a good deal. These considerations may not tell us precisely how a lawyer will contribute to the resolution of certain cases, nor should it. If outcome prediction is expected, neither justice, nor the parties, nor our national community will be well served. If the lawyers who are crucial to the resolution of cases are not guided by achieving just ends but rather on some predictable political result, then the goal of justice is compromised. The virtues of justice, prudence, courage, and wisdom—when found in and practiced by lawyers—tell us little about how a lawyer will contribute to the determination of a specific case. On the other hand, they do tell us a good deal about the kind of person the lawyer is and how we, as members of both the profession and society, get to the just end for individuals as well as the public good.

If Dorothy and her companions—and Toto, too—could rely on virtues to seek and secure their goals, just think of what the members of the American legal profession could achieve in their quest for justice if they made the model of the virtuous lawyer the norm for reality.